

Fit for Its Ordinary Purpose? Tobacco, Fast Food, and The Implied Warranty of Merchantability*

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In one of the greatest and most controversial generalities of commercial law, Article 2 of the Uniform Commercial Code declares that many of the goods sold today must be "fit for the ordinary purposes for which such goods are used."¹ What is missing, however, is a detailed description or explanation as to what this warranty of merchantability means. For example, the world is left to wonder whether latent or unknown defects make a product unmerchantable if these problems do not manifest themselves until long after the product is consumed. Although the Uniform Commercial Code was first drafted over fifty years ago, the precise meaning of merchantability is still unresolved.

Perhaps the defining moment for the implied warranty of merchantability lies in the future outcome of the tobacco cases. This note examines the past, present, and future of tobacco litigation in an effort to distill the best possible interpretation of the implied warranty of merchantability. After examining the development of tort product liability theories and the conceptual framework of the Uniform Commercial Code, a merchantability standard that relies on the functional purpose of the goods emerges as the best result. Rather than focusing on the subjective intention of the parties involved, the definition and application of the implied warranty of merchantability should rely on an objective standard based on the product's most basic function.

After establishing this standard, this note concludes by describing the current debate over the liability of fast-food merchants for the obesity problems in this country. The fast-food litigation will invariably follow the path of the tobacco cases. Therefore, the merchantability jurisprudence arising from tobacco lawsuits will be crucial in predicting the future of the implied warranty in the fast-food cases.

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¹ U.C.C. § 2-314(2)(c) (2000).

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I. INTRODUCTION

Throughout the history of tobacco litigation, plaintiffs have used a variety of legal theories when bringing actions against the tobacco industry. Strict products liability, failure to warn, simple negligence, conspiracy, RICO, unjust enrichment, and Medicaid subrogation are all theories that confront litigants and courts today.² One legal claim that has survived from the beginning is the implied warranty of merchantability,³ sometimes referred to in its earlier forms as the implied warranty of wholesomeness or quality. Because so much of what defines the implied warranty surrounds the determination of whether particular goods are merchantable within the meaning of section 2-314 of the Uniform Commercial Code ("U.C.C."), the study of tobacco litigation provides a different perspective from which to analyze the intricacies of merchantability. Cigarettes are a truly unique product with a storied past. Although our justice system has provided examples in other mass tort cases involving prescription drugs and industrial substances like asbestos, cigarettes do not neatly fit into any of these categories. Thus, courts have found themselves in a position of choosing merely to look at cigarettes in the context of their basic use for smoking, or by expanding their analysis further by examining whether cigarettes possess hidden dangers that render them unmerchantable.

This note seeks to accomplish two goals—one descriptive, the other prescriptive. Part I examines the basic applications of the implied warranty of merchantability and then collects the cases dealing with tobacco litigation in an analysis of how the courts have applied the implied warranty to cigarettes. Part II provides the reader with an outline of the implied warranty and its general functions and details. This outline provides the reader with a foundation for later understanding the history and evolution of the implied warranty, including its contemporary application to tobacco litigation. Part III describes the history of the tobacco cases and how the law has developed, paying specific attention to the implied warranty of merchantability. Part IV analyzes the main U.C.C. section 2-314 issues that face today's tobacco litigants by offering an analysis of contemporary case law. This Part is especially comprehensive in the sense that it explores areas that affect the basic implied warranty, yet seem far removed from the basic warranty language.

² The University of California at San Francisco has placed a collection of tobacco industry documents on the Internet. These include various pleadings and briefs from various states' Attorneys General that describe the legal theories used today. University of California at San Francisco, *Tobacco Control Archives*, at <http://www.library.ucsf.edu/tobacco/litigation/states.html> (last updated Jan. 24, 2001); see *Task Force on Tobacco Litigation*, 27 CUMB. L. REV. 575 (1996) (providing a feasibility study for the Alabama Attorney General concerning the possible success of pursuing a subrogation claim against the tobacco industry).

³ U.C.C. § 2-314.

The prescriptive analysis explains how courts should change their current application of U.C.C. section 2-314 by adopting a basic interpretation such that cigarettes should be deemed merchantable, so long as they fulfill their functional purpose without regard to their latent impact on health. Part VI analyzes the underlying policy of the implied warranty and provides a new analysis of merchantability that focuses on the ostensible, functional purpose of goods as opposed to any analysis of hidden dangers in determining whether goods are merchantable. The tobacco cases of the last fifty years have provided a stage for courts to develop fully the law of merchantability, and too often the result has been an extensive evaluation of hidden dangers and subjective intentions that receive a more appropriate analysis under products liability and consumer law. This process has resulted in the implied warranty of merchantability becoming nearly synonymous with a strict products liability claim under section 402A of the second Restatement of Torts ("Restatement section 402A"), which is a far cry from the buyer's basic promise that the goods will fulfill their basic function. After proposing a "functional purpose" test for determining product merchantability, this note explains the need for such a basic interpretation of U.C.C. section 2-314. Specifically, the reader will find that the expansive analysis engendered by many courts in applying section 2-314 usually results in the nullification of the implied warranty of merchantability, as it is subsumed within the courts' basic products liability jurisprudence, usually under Restatement section 402A. Additionally, a broad inquiry into whether products are merchantable is not consistent with the conceptual framework envisioned by the drafters of the Uniform Commercial Code.

The analysis closes with a look at the new frontier for the implied warranty of merchantability—fast food litigation.⁴ Those who oppose the prevalence of fast food, also known as "toxic food," in our society have mimicked the anti-tobacco campaigns in an effort to regulate the fast food industry. In fact, one of the key players in the anti-tobacco movement, Professor John Banzhaf, is now leading the charge against fast food.⁵

Those intrigued by the recent events in the field of mass tort litigation that concern the fast food industry should pay special attention to the history and analysis of tobacco litigation contained in the coming pages. The history of tobacco litigation is the future of the fast food industry. Those who dismiss the likelihood of success for fast food plaintiffs have not grasped the lesson of tobacco litigation. As Professor Banzhaf recently stated, "[w]e know from

⁴ See Jonathan Turley, *Fast Food Litigation Suddenly on Litigation Fast Track*, COLUMBUS DISPATCH, July 31, 2002, at A7 ("Leave it to lawyers to combine the two favorite American pastimes: eating and suing. In various states, lawsuits have been filed or are being planned against the fast-food industry.").

⁵ Professor Banzhaf maintains a website describing his position and recent events in the battle against fast food. See John F Banzhaf III, *Using Legal Action to Help Fight Obesity*, at <http://www.banzhaf.net/obesitylinks> (last visited Oct. 19, 2002).

tobacco litigation that initial suits have real difficulties because the public has real problems accepting new ideas and new concepts. . . . It took us many years to get us to the point of educating juries about tobacco, [but] now they are.”⁶

By establishing a proper jurisprudence with the tobacco cases, courts can set the correct precedent for adjudicating fast food litigation. As many courts apply the implied warranty of merchantability to the tobacco cases, they open the door to successful claims that fast food is unmerchantable merely because it is high in fat, calories, and sodium. Reshaping their jurisprudence as described herein will avoid the further distortion and misapplication of the implied warranty of merchantability when it is applied to fast food litigation.

II. A PRIMER ON THE U.C.C. IMPLIED WARRANTY OF MERCHANTABILITY

The implied warranty of merchantability, codified in section 2-314 of the U.C.C., is no less than the seller’s implied promise that the goods sold in a contract of sale will work. It is a warranty that arises as an operation of law, as opposed to an affirmative promise from the seller, and simply codifies the parties’ expectations of what the goods are for and what they will accomplish for the buyer. In this way, the U.C.C.’s implied warranty of merchantability gives teeth to the bargain and provides the buyer with one method for forcing the seller to behave properly. Where the seller is a merchant and nothing else is said between the parties concerning the expected performance of the goods, the buyer at least benefits from the basic promise that the goods will fulfill the basic function of their ordinary purpose. There are, however, many nuances to U.C.C. section 2-314, which are discussed below.

A. *The Language*

As with any discussion of American statutory law, we first begin with the language. Section 2-314 of the U.C.C. provides:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

⁶ Geraldine Sealey, *Whopper of a Lawsuit: Fast Food Chains Blamed for Obesity, Illnesses*, ABCNEWS.COM (July 26, 2002), at <http://abcnews.go.com/sections/us/DailyNews/fatsuit020725.html> (last visited Oct. 19, 2002) (reporting on a class action lawsuit filed by Caesar Barber against four major fast food producers for health related illness resulting from Barber’s consumption of fast food).

- (b) in the case of fungible goods, are of fair average quality within the description; and
 - (c) are fit for the ordinary purposes for which such goods are used; and
 - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - (e) are adequately contained, packaged, and labeled as the agreement may require; and
 - (f) conform to the promise or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.⁷

Some aspects of the warranty are express and rather clear, such as the mention of disclaimers and the requirement that the seller be a merchant as to goods. Other language is considerably more nebulous. For example, subsection 2 of U.C.C. section 2-314, describing the minimum qualifications of merchantability, is full of language that crafty attorneys could manipulate to their advantage. One does not need extensive research to see clearly that whether goods “are fit for the ordinary purposes for which such goods are used”⁸ can create a variety of angles and arguments, thus creating much litigation. The following sections examine the nuances of the implied warranty in detail.

1. Some Initial Conditions to the Warranty: Merchants and Disclaimers

The first sentence of U.C.C. section 2-314 provides some important conditions that must be examined before moving on to the actual warranty language. A quick reading of the text points to some important requirements of section 2-314 in this opening sentence. As noted above, this is an implied warranty. It does not arise out of any promises made by sellers; rather, it arises as an operation of law, meaning that sellers make the warranty unless they disclaim it.⁹ Moreover, it is a warranty made only by merchants with respect to goods of the kind involved in the contract of sale. Tobacco companies are always the main defendants in the tobacco cases, and there is never any problem as to whether cigarette manufacturers can be fairly deemed “merchant[s] with respect to goods of that kind.”¹⁰ The former aspect of the implied warranty, the one allowing a merchant to disclaim section 2-314 of the U.C.C., deserves brief analysis.

⁷ U.C.C. § 2-314.

⁸ U.C.C. § 2-314(2)(c).

⁹ *Id.* § 2-314(1).

¹⁰ *Id.* Section 2-104 of the U.C.C. defines the term “merchant” as it is used in the Code. Although Official Comment 2 of section 2-104 specifically mentions section 2-314 and states that a merchant with respect to goods of that kind is narrower than the general definition of “merchant,” it is undisputed as to whether tobacco manufacturers possess the “professional

The Uniform Commercial Code's section 2-316 allows for a variety of ways to disclaim the implied warranties it creates.¹¹ In the context of tobacco litigation, it suffices to say that the disclaimer of the implied warranty of merchantability never arises in the tobacco cases, which is likely due to the restrictions imposed on sellers dealing in consumer goods. As a general matter, many states have either modified their respective U.C.C. Article 2, or they have included provisions in separate consumer protection statutes that declare any attempt to disclaim the implied warranty of merchantability unenforceable.¹² Disclaiming the warranty

status as to [the] particular kind of goods" suggested by Official Comment 2 as a suitable description for a merchant with respect to goods of that kind.

It is also important to note that only "sellers" give implied warranties. A "seller" is "a person who sells or contracts to sell goods." U.C.C. § 2-103(1)(d). Thus, cigarette manufacturers may clearly be merchants, but may not necessarily be sellers if they are not a party to the contract for sale to the individual smokers. In other words, a cigarette manufacturer may argue that it is not a seller because it is never a party to the contract of sale of cigarettes to the smoker. Rather, the warranty is made by a local retailer who is the proper "seller." This argument stems from a basic contractual concept that parties owe no duty unless they are in privity of contract with the aggrieved party. The U.C.C. provides no definite position on the concept of privity between the manufacturer and end-purchasers (known as "vertical privity"). See U.C.C. § 2-318 cmt. 3. Although this distinction rarely plays a part when determining whether cigarette manufacturers make an implied warranty of merchantability to individual smokers, it does play a role in some interpretations of the notice requirement for a breach of warranty claim under U.C.C. section 2-607(3)(a). See *infra* note 213.

Privity of contract also plays an important role with respect to defendants who are not cigarette manufacturers. Early in the tobacco and health debate, the tobacco industry created certain research committees with the intent of distributing scientific information to challenge the growing concern about smoking. See *Player, infra* note 40, at 323. Plaintiffs have brought actions against organizations like The Tobacco Institute and the Council for Tobacco Research in an attempt to hold them liable under the same theories used against actual cigarette manufacturers. Since warranty law only applies to sellers and buyers, courts quickly find that warranty claims against these organizations are not valid, for there is no contract of sale between the research institutions and the plaintiffs. See, e.g., *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996) ("Even where a party has promoted a product, and made promises regarding that product, if the party is not the actual seller a claim for breach of warranty will not lie.") (citations omitted).

¹¹ U.C.C. § 2-316.

¹² See, e.g., ALA. CODE § 7-2-316(5) (2001) ("Nothing in subsection (2) or subsection (3)(a) or in Section 7-2-317 shall be construed so as to limit or exclude the seller's liability for damages for injury to the person in the case of consumer goods."). The practitioner should note, however, that the language of the Alabama statute does not prevent the disclaimer of merchantability from arising out of the usage of trade or in situations where the buyer has examined, or properly refused to examine, the goods. § 7-2-316(3)(b); see also KAN. STAT. ANN. § 50-639(a) (2000) ("[N]o supplier shall: (1) exclude, modify or otherwise attempt to limit the implied warranties of merchantability. . . ."); MD. COM. LAW I § 2-316.1(2) (Supp. 2002) ("Any oral or written language used by a seller of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those

of merchantability is one valid method sellers employ to limit their liability. Consumer advocates, however, would interpret a warranty disclaimer as the seller essentially saying, "Don't trust us—our goods don't work, but we'd be happy to take your money." In many states, the consumers won this battle, and any attempt to disclaim the implied warranty of merchantability is void. This explains the absence of disclaimers from the reported tobacco cases.

2. *The Meaning of Merchantability*

Although the U.C.C. does not define merchantability *per se*, subsection 2 of 2-314 provides a list of minimum qualities that goods must possess in order to be merchantable.¹³ The characteristics given for merchantable goods may be summarized in three broad statements: (1) the goods must be of average quality when compared with other similar goods in the industry, (2) they must be "fit for the ordinary purposes for which goods are used," and (3) they must be properly packaged and labeled.¹⁴ Courts have applied the warranty of merchantability¹⁵ in a variety of situations, including the wholesomeness of food¹⁶ and the adverse side-effects of pharmaceuticals.¹⁷ The meaning of merchantability will generally

warranties, is unenforceable."); MASS ANN. LAWS ch. 106 § 2-316A (Law. Co-op. Supp. 2002) (prohibiting merchants from disclaiming the implied warranty of merchantability in the sale of consumer goods); VT. STAT. ANN. tit. 9A § 2-316(5) (2001) ("Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be unenforceable."); RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-316:104, at 187-89 (3d ed. 1995) (providing a partial list of various state consumer statutes).

¹³ See U.C.C. section 2-314, comment 6, which states:

Subsection (2) does not purport to exhaust the meaning of "merchantable" nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is "must be at least such as . . .," and the intention is to leave open other possible attributes of merchantability.

¹⁴ See U.C.C. § 2-314(2).

¹⁵ See generally C. Clifford Allen, Annotation, *What Are "Merchantable" Goods Within Meaning of U.C.C. § 2-314 Dealing With Implied Warranty of Merchantability*, 83 A.L.R. 3d 694 (Supp. 2001). This annotation provides a starting point for collecting the cases defining merchantability. Another source is the U.C.C. Reporting Service, which includes a digest organized by U.C.C. section number.

¹⁶ See *Webster v. Blue Ship Tea Room, Inc.*, 198 N.E.2d 309, 312 (Mass. 1964) (holding that fish chowder containing fish bones was merchantable because the plaintiff, a New England native, should have guarded against the presence of bones in the chowder).

¹⁷ See *Fellows v. USV Pharmaceutical Corp.*, 502 F. Supp. 297, 299-300 (D. Md. 1980) (holding that a prescription drug was merchantable even though it produced an unwanted side-effect in the plaintiff).

be an issue of fact¹⁸ based on the type of goods at hand.¹⁹ President Andrew Jackson once said, "It is a damn poor mind that can only think of one way to spell a word."²⁰ The same logic essentially applies to anyone trying to define the term "merchantability," especially the phrase "fit for the ordinary purposes for which such goods are used."

Each of the three broad concepts of merchantability, especially the fitness for ordinary purpose and proper packaging and labeling, plays an important role in current tobacco litigation. In fact, these issues are interlaced with federal preemption questions,²¹ the alleged manipulation of nicotine levels,²² and the controversial question of whether cigarettes are unmerchantable because smoking often results in chronic illness.²³ Deciding whether cigarettes are merchantable is probably more crucial in litigating this issue today than it has been in the past. Courts are continually faced with the questions of how far they should evaluate the hidden dangers of smoking and whether there are any truly hidden dangers of smoking at all. Because the question of merchantability is quite factual in nature, it does not lend itself to broad statements of the law. Therefore, specific treatment by the courts of the tobacco and merchantability question deserves, and receives, its own individual analysis as it relates to current cases in Part IV.B.

¹⁸ See 2 THE AMERICAN LAW OF WARRANTIES § 13:63, at 314-15 (1991), which states:

The question of whether goods are merchantable under the Uniform Commercial Code is generally one of fact for the jury. . . . In some circumstances the court should rule that as a matter of law there has been no breach of the implied warranty of merchantability. When there is conflicting evidence as to whether the seller breached an implied warranty of fitness for a particular purpose, the question is one of fact for the jury.

¹⁹ As White and Summers appropriately claim, "[w]e cannot hope to summarize the thousands of cases that deal with the question of merchantability. We can only suggest where a frustrated lawyer might look for help in determining whether the goods of his particular case ought to be classified as merchantable or nonmerchantable." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 9-8, at 366 (5th ed. 2000).

²⁰ This quote was retrieved from *Rand Lindsay's Quotes*, at <http://www.quotationspage.com/search.php3?homesearch=Andrew+Jackson&x=58&y=12> (last visited Oct. 19, 2002).

²¹ See *infra* Part IV.A.2.

²² See *infra* Part IV.B.

²³ Some early comments on the Code have even contemplated that U.C.C. section 2-314 could extend to an analysis of hidden dangers and whether or not that problem could make cigarettes unmerchantable. See CHARLES BUNN ET AL., AN INTRODUCTION TO THE UNIFORM COMMERCIAL CODE § 2.26(B), at 99-101 (1964).

B. Breach of the Implied Warranty of Merchantability: Elements of the Claim

To succeed in a suit for the breach of implied warranty, the plaintiff must show the following: (1) that a merchant sold goods,²⁴ (2) that the goods were not merchantable, (3) the plaintiff suffered an injury and resulting damages, (4) that the unmerchantable goods were both a proximate cause and a cause in fact for the plaintiff's injuries, and (5) that the plaintiff gave proper notice to the seller of the breach of warranty.²⁵ Of these above elements, this note cannot attempt to cope with the seemingly immense burden of proving both a plaintiff's injury from smoking and that smoking was the proximate cause of the injury. Such tasks are left for the individual plaintiffs, their attorneys, and their experts. The issues of whether the seller is a merchant and whether the goods are merchantable are described above.²⁶ The issue of proper notice, however, deserves brief treatment here.

With respect to accepted goods, "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy. . . ."²⁷ The Official Comment for U.C.C. section 2-607 states that reasonableness in the notice context will be governed by commercial standards.²⁸ Additionally, the contents of the notice need not be

²⁴ Privity between the manufacturer and the smoker only arises occasionally as an issue when private plaintiffs litigate tobacco cases. See *Watkins v. R.J. Reynolds Tobacco Co.*, No. 98-130, 1998 U.S. Dist. LEXIS 23328, at *7 (E.D. Ky. Oct. 14, 1998) (finding the plaintiff failed to establish privity of contract with the tobacco defendant). However, privity of contract may be an issue when states sue tobacco companies based on their Medicaid subrogation statutes for recovery of state Medicaid expenditures for smokers suffering from illnesses caused by cigarettes. For a thorough analysis of the issues faced by states when deciding to file a Medicaid subrogation suit, the reader should refer to Alabama's analysis of the situation in *Task Force on Tobacco Litigation*, *supra* note 2.

Privity of contract also plays a role when employee retirement organizations and unions seek to recover medical expenses paid on behalf of members. These claims often fail to overcome the fact that the retirement plan or union itself was not in privity of contract with the cigarette manufacturer and thus could not recover. See *Ark. Carpenters' Health & Welfare Fund v. Philip Morris, Inc.*, 75 F. Supp. 2d 936, 945 (E.D. Ark. 1999) (dismissing a claim for breach of implied warranty and noting that the plaintiff never alleged that it purchased any tobacco products); *Int'l Bhd. of Teamsters Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 34 F. Supp. 2d 656, 664-65 (N.D. Ill. 1998) ("[T]he Funds neither allege that they purchased the tobacco products nor ever relied on any of the alleged representations regarding the defendants' products. Accordingly, count VII [breach of warranty] is dismissed with prejudice for failure to state a claim, and alternatively, for the Funds' lack of standing.").

²⁵ See WHITE & SUMMERS, *supra* note 19, § 9-7, at 510-11.

²⁶ See *supra* Part II.A.1.

²⁷ U.C.C. § 2-607(3)(a) (2000).

²⁸ See comment 4 of U.C.C. section 2-607(3)(a), which states:

formal and need not include a threat of litigation, although at least one court has held that the pleadings alone are sufficient notice of breach of warranty.²⁹ Notice can occur either in oral or written form.³⁰

It is important to note briefly the harshness of section 2-607(3)(a). The statutory language states that in the absence of proper notice, the buyer will be precluded from all U.C.C. remedies, which include such provisions as revocation of acceptance and the right to sue for damages.³¹ Although notice is a relatively simple matter, compliance is a necessity, and any lawyer must be careful not to overlook the requirement.³²

C. Breach of Implied Warranty of Merchantability: The Defenses

The U.C.C. affirmative defenses to a breach of warranty claim that are most relevant to this note are statute of limitations and assumption of risk.³³ The U.C.C. provision governing the statute of limitations is section 2-725, which provides that the suit must be commenced within four years after the cause of action accrues.³⁴ As to the question of when the cause of action accrues, sellers

The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

²⁹ *Pace v. Sagebrush Sales Co.*, 560 P.2d 789, 792 (Ariz. 1977); *see also infra* note 214 and accompanying text.

³⁰ *WHITE & SUMMERS*, *supra* note 19, § 11-10, at 421.

³¹ *Id.* at 417.

³² *See infra* Part IV.C.2.

³³ Although the U.C.C. affirmative defenses may seem limited, defendants are often successful in arguing that cigarettes are in fact merchantable. Defendants are also utilizing other defenses such as federal and state preemption.

³⁴ U.C.C. § 2-725(1) (2001) (permitting parties to reduce the statute of limitations to not less than one year but forbidding the parties to extend it beyond the four-year limitation). The U.C.C.'s four-year statute of limitations provides an important contrast to the popular tort claims of strict products liability. Products liability cases, such as those brought under section 402A of the second Restatement of Torts on strict products liability, comply with state statute of limitation laws that are generally two years in duration. *See, e.g.*, OHIO REV. CODE ANN.

breach the implied warranty of merchantability upon tender of delivery, regardless of whether the buyer knows of the breach.³⁵ Thus, the purchase of goods is the moment when the action accrues for a breach of the implied warranty of merchantability.³⁶ This is seemingly a harsh result, but U.C.C. section 2-725(4) stipulates that other state law relating to the tolling of the statute of limitations remains in effect and is not disturbed by the U.C.C.'s statute of limitations. Practitioners must pay close attention to state law when analyzing the statute of limitations problem surrounding their case.³⁷

The assumption of risk defense and its variations, especially as they relate to strict products liability, play a major role in tobacco litigation, and will likely serve as a component of every case seeking to impose liability on the tobacco industry. From the standpoint of a typical breach of implied warranty case, jurisdictions have differing views on how plaintiffs' negligent conduct affects their ability to recover. Most will agree that when plaintiffs assume the risks associated with using particular goods, they are completely barred from recovery, but what constitutes assumption of risk will vary from state to state.³⁸ Since this portion of the note is only a primer, it suffices to say that assumption of risk issues require careful thought and research in order to determine how they apply in each jurisdiction. Specific assumption of risk issues as they relate to tobacco litigation are addressed in Part IV.C.1.

III. A BRIEF HISTORY OF TOBACCO LITIGATION

Tobacco litigation in America has been transformed significantly in the nearly fifty years since Eva Cooper filed suit against R.J. Reynolds in Massachusetts, a case that produced the first reported decision concerning tobacco and its effect on health.³⁹ Initially, the debate turned on legal theories addressing warranties, foreseeability, and assumption of risk issues. In the

§ 2305.10 (Anderson 2001); *see also* WHITE & SUMMERS, *supra* note 19, § 11-9, at 413. Thus, a claim for injury based on the implied warranty of merchantability may give a plaintiff more time to recover than the shorter two-year statute applied in most products liability cases.

³⁵ U.C.C. § 2-725(2) (2001).

³⁶ *See* 1 THOMAS D. CRANDALL ET AL., UNIFORM COMMERCIAL CODE § 8.20, at 8:118 (2001) ("With regard to implied warranties, . . . the breach occurs (if at all) at the time of tender (for the obvious reason that, by its very nature, an implied warranty cannot explicitly extend to future performance)."). Crandall also notes that some states have altered the application of the statute of limitations concerning products liability actions and warranty actions involving personal injury. *Id.* at 8:120.

³⁷ The tobacco cases have also produced some opinions addressing the U.C.C.'s statute of limitations; those cases are collected and analyzed in Part IV.A.1.

³⁸ WHITE & SUMMERS, *supra* note 19, § 11-8, at 408-09. Many states have also legislated on the issue of comparative fault and assumption of risk. *See* OHIO REV. CODE ANN. § 2315.19 (Anderson 2001); *see also* WHITE & SUMMERS, *supra* note 19, § 11-8, at 411.

³⁹ *Cooper v. R.J. Reynolds Tobacco Co.*, 234 F.2d 170 (1st Cir. 1956).

contemporary era, tobacco plaintiffs are armed with significantly more information and new angles of attack. The following sections analyze the three eras of tobacco litigation, including the current context and how it evolved.⁴⁰

A. *The Early Years*

1. *The First Cases*

The question of foreseeability of harm from smoking dominated the early days of tobacco litigation. Cigarette manufacturers often claimed that any harm caused by smoking was simply not foreseeable due to the lack of scientific research available at the time.⁴¹ This defense is somewhat peculiar in light of the history of implied warranties. Professor Samuel Williston found in 1948 that most American jurisdictions had adopted the English concept of implied warranties of quality and that the obligation of the manufacturer is strict, not merely one of negligence.⁴² Whatever the state of law, courts of the era generally allowed tobacco companies to avoid liability based on the fact that they could not foresee the potential harm from smoking. Although some of the early cases occurred before the adoption of the U.C.C., a brief review is instructive in understanding the development of the theory.

*Green v. American Tobacco Companies*⁴³ represents the first major implied warranty case involving a plaintiff seeking recovery from the tobacco industry for injuries resulting from smoking cigarettes. Edwin Green, Sr. initially filed suit in 1957 claiming that he contracted lung cancer from smoking Lucky Strike

⁴⁰ This note will not provide new revelations in the history of tobacco litigation. Others have written excellent histories, and the reader is encouraged to examine these sources for a more thorough study. See generally Ingrid L. Dietsch Field, Comment, *No Ifs, Ands, or Butts: Big Tobacco is Fighting for Its Life Against a New Breed of Plaintiffs Armed with Mounting Evidence*, 27 U. BALT. L. REV. 99 (1997); Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992); Marcia L. Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 631 (1987); Tucker S. Player, Note, *After the Fall: The Cigarette Papers, the Global Settlement, and the Future of Tobacco Litigation*, 49 S.C. L. REV. 311 (1998).

⁴¹ Dietsch Field, *supra* note 40, at 106. The public scare relating to smoking and health began in the 1950's with a number of articles from popular publications like *The Readers' Digest*. See Rabin, *supra* note 40, at 856-57. Even with the escalating level of public information and concern, the concept of foreseeability was considerably narrower fifty years ago than it is today. *Id.* at 861. Thus, tobacco defendants could argue no decisive scientific data existed to reasonably indicate that cigarettes were harmful.

⁴² 1 SAMUEL WILLISTON, WILLISTON ON SALES § 237, at 617-20 (rev. ed. 1948). Williston also points to the enactment of the pre-U.C.C. Uniform Sales Act and its section 15 which created implied warranties, including an implied warranty of merchantability. *Id.*

⁴³ 304 F.2d 70 (5th Cir. 1962).

cigarettes.⁴⁴ Green died shortly thereafter and his son was substituted as plaintiff alleging, among other claims, breach of implied warranty.⁴⁵ The case went to the jury which returned a verdict for the defendants, finding that American Tobacco could not have foreseen the adverse health effects of smoking and thus could not be liable under an implied warranty of merchantability.⁴⁶ Green appealed the trial court's judgment, claiming that the ability to foresee the harm of smoking tobacco is irrelevant to the determination of breach of implied warranty.⁴⁷ The Fifth Circuit Court of Appeals affirmed the district court's interpretation of the applicable implied warranty law as imposing liability only when the defendant is capable of foreseeing the alleged harm.⁴⁸ However, the Fifth Circuit decided to certify⁴⁹ the question of foreseeability to the Florida Supreme Court, recognizing the potential impact of this claim and the importance of the case at hand.⁵⁰

The Florida Supreme Court eventually determined that foreseeability, in fact, was not a required element for establishing a breach of implied warranty.⁵¹ This ruling struck a major blow to tobacco defendants by stripping them of the ability to avoid warranty claims by stating the harm from smoking was not foreseeable.⁵² The reality of the situation, however, was much different. First, in the final

⁴⁴ *Id.* at 71.

⁴⁵ *Id.*

⁴⁶ *Id.* at 71-72.

⁴⁷ *Id.* at 73.

⁴⁸ *Id.*

⁴⁹ *Green v. Am. Tobacco Co.*, 304 F.2d 70, 77 (5th Cir. 1962).

⁵⁰ *Green v. Am. Tobacco Co.*, 154 So. 2d 169, 170 (Fla. 1963). While *Green* was pending certification in Florida, the analysis of foreseeability and implied warranties continued in another case in the Fifth Circuit. Between the time of certification and the Florida Supreme Court's answer in *Green*, the Fifth Circuit Court of Appeals addressed the same foreseeability issue in *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963), another major case concerning implied warranties. See Dietsch Field, *supra* note 40, at 101-03. Lartigue, a lifelong smoker for fifty-five years, contracted lung cancer and died in 1955. *Lartigue*, 317 F.2d at 22. His widow filed suit after his death and alleged breach of warranty and negligence. *Id.* After losing at trial, Lartigue's widow appealed on the basis that the trial court's jury instructions had mischaracterized the then implied warranty of wholesomeness as one hinging on whether the tobacco manufacturer could foresee the ill-effects of smoking. *Id.* at 23. The Fifth Circuit Court of Appeals analyzed Louisiana law pertaining to implied warranties as well as the recent release of Restatement section 402A from the American Law Institute. *Id.* at 25-31. The Court of Appeals acknowledged that the law of strict liability was still developing and the lines between warranty and tort were somewhat blurred. *Id.* at 39. In any event, the Fifth Circuit affirmed the trial court's characterization of wholesomeness as requiring a showing that the defendant could foresee the harm caused by cigarette smoking before liability would be triggered. *Id.* at 39-41.

⁵¹ *Green*, 154 So. 2d at 170 ("Upon the critical point, our decisions conclusively establish the principle that a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty. . . .").

⁵² See Stein, *supra* note 40, at 636.

analysis of *Green* and after twelve years of litigation, the Fifth Circuit ultimately concluded that cigarettes were in fact merchantable.⁵³ Second, as hinted by the conclusion in *Green*, the sheer burden of litigation often battered plaintiffs into submission. A common tactic that survives today is the strategy of litigating every case to the end in an attempt to exhaust the plaintiff's resources.⁵⁴ Some cases that were seen as shining lights with some modest hope of success for plaintiffs were actually abandoned for lack of resources, as opposed to exhaustion of legal theory.⁵⁵

2. The Legislative and Policy Front

The close of the first wave of tobacco litigation saw the advent of three key events in the saga of tobacco litigation: the publishing of the Report to the Surgeon General on Smoking ("1964 Report"),⁵⁶ the adoption of the American Law Institute's ("ALI") Restatement section 402A concerning strict products liability,⁵⁷ and the enactment of the Cigarette Labeling and Advertising Act

⁵³ In an interesting conclusion, the Fifth Circuit eventually overruled one of its prior decisions by concluding that cigarettes were merchantable, and thus any discussion of affirmative defenses, like contributory negligence, would be irrelevant. See *Green v. Am. Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969) (adopting *Green v. Am. Tobacco Co.*, 391 F.2d 97, 110 (5th Cir. 1968) (Simpson, J., dissenting) (finding that cigarettes are not defective and do not breach any warranties of merchantability)).

⁵⁴ See Rabin, *supra* note 40, at 857-58.

⁵⁵ *Id.* at 863 (describing *Pritchard v. Liggett & Meyers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961), where the plaintiff was forced to abandon the suit for lack of resources).

⁵⁶ U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUB. HEALTH SERVICE (1964) [hereinafter 1964 REPORT].

⁵⁷ RESTATEMENT (SECOND) OF TORTS § 402A (1965). This section states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id. In 1998, the ALI published the third Restatement of Torts dealing exclusively with products liability issues. Few courts have explored the doctrines proposed in the third Restatement of Torts; their reluctance to do so probably results from the many state legislatures that have elected to codify products liability law instead of relying on state courts to develop the common law doctrines. Of the states that have codified their products liability law, most of them have

("1965 Act").⁵⁸ Each had an important impact on the tobacco liability dynamic and also marked the end of major tobacco litigation for the next twenty years.

Before the release of the 1964 Report, the causal connection between smoking and deteriorating health lacked an air of conclusiveness. The American public fed on a steady diet of journalistic attacks by *The Reader's Digest*, *Time*, *Newsweek*, *The Atlantic Monthly*, *Harper's*, *The New Republic*, and *The Nation*,⁵⁹ but the country lacked a definitive statement establishing the adverse impact of smoking on health. The Surgeon General's report was highly publicized and established a scientific causal link between smoking and a variety of cancers and related illnesses.⁶⁰ Coupled with the earlier attacks on tobacco from the news media, the Surgeon General's report seemingly put America on notice that cigarette smoking was inherently dangerous.⁶¹ Since assumption of risk was a defense to the implied warranty cases,⁶² the impact of affirmatively establishing the public's knowledge of the dangers of cigarette smoking could be devastating for plaintiffs, especially in light of the fact that a plaintiff's knowledge of the ill-effects of smoking has "hovered like a storm cloud over every smoker's claim against the tobacco companies."⁶³

Next, the adoption of Restatement section 402A revolutionized the thinking on strict products liability. Significantly, some of the debate concerning the precise language of section 402A revolved around its perceived impact on the tobacco industry.⁶⁴ Dean Prosser drafted Restatement section 402A to read that liability will follow for products that are in a "defective condition unreasonably dangerous" to the user.⁶⁵ Others objected by stating that the addition of the word "defective" was redundant because "unreasonably dangerous" would provide the same result.⁶⁶ Some advisors even expressed specific concern about the tobacco industry and the need to protect its economic viability.⁶⁷ Prosser evidently concurred with the position and indicated that items such as whiskey and

based their statutes on Restatement section 402A. See *infra* notes 156-70 and accompanying text.

⁵⁸ Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965).

⁵⁹ See Stein, *supra* note 40, at 643; Rabin, *supra* note 40, at 856-57 (citing several magazine articles).

⁶⁰ See *id.* at 643 (citing 1964 REPORT, *supra* note 56, at 37-39).

⁶¹ See *id.* at 642-43.

⁶² See *Pritchard v. Liggett & Meyers Tobacco Co.*, 350 F.2d 479, 485 (3d Cir. 1965).

⁶³ Robert L. Rabin, *Some Thoughts on Smoking Regulation*, 43 STAN. L. REV. 475, 493 (1991) (review essay).

⁶⁴ Stein, *supra* note 40, at 642.

⁶⁵ Rabin, *supra* note 40, at 863 (citing 38th Annual Meeting, 1962 A.L.I. PROC. 87-89 (1961)).

⁶⁶ *Id.*

⁶⁷ Stein, *supra* note 40, at 642.

cigarettes may be considered dangerous, but nonetheless were not defective.⁶⁸ This seems to have ended the matter as Prosser incorporated his position into Comment i, and the ALI members approved Restatement section 402A on a voice vote.⁶⁹

Finally, the tobacco industry asserted its political strength⁷⁰ when Congress passed the 1965 Act.⁷¹ This Act required that each package of cigarettes display the warning: "Caution: Cigarette Smoking May be Hazardous to Your Health."⁷² Furthermore, the Act prohibited states from imposing any further requirements on tobacco manufacturers about labeling their products.⁷³ This requirement created a

⁶⁸ Rabin, *supra* note 40, at 863. The verbal debate was not the only indication of how Restatement section 402A should apply to the tobacco industry—the official comment explained a great deal about the drafter's intent with regard to cigarettes. Comment i to Restatement section 402A states that "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965). Considering the major influence the Restatements have on American courts, and the clear intent that strict products liability under Restatement section 402A should not apply to cigarettes, the end of the first round of tobacco litigation seemed a certainty. *See* Rabin, *supra* note 40, at 864 ("In a sense, the Restatement proviso sounded the death knell for the first wave of tobacco litigation.").

⁶⁹ Stein, *supra* note 40, at 642 (citing *38th Annual Meeting*, 1962 A.L.I. PROC. 87–89 (1961)).

⁷⁰ *See id.* at 645–46 (providing a concise description of the political power wielded by the tobacco industry and its supporters in Congress).

⁷¹ *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965). Section 10 of the 1965 Act established an expiration date for the Act of July 1, 1969. Congress then passed the new and similar, Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87 (1970) (codified as amended in 15 U.S.C. §§ 1331–40). The most important change in the 1969 Act was the preemptive language in 15 U.S.C. § 1334, making the reach of the 1969 Act seemingly broader than the 1965 Act. This 1969 Act language remains unchanged today. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 514–15 (1992); *see also infra* note 73.

⁷² Federal Cigarette Labeling and Advertising Act § 4.

⁷³ *Id.* § 5(a)–(b). These subsections state:

(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Id. Foreshadowing Supreme Court analysis, the reader may contrast the 1965 Act language with the language from the section 5(a)–(b) of the 1969 Act:

(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

much-litigated issue concerning preemption that found only a troubled resolution when it reached the United States Supreme Court in *Cipollone v. Liggett Group, Inc.*⁷⁴ during the 1990s.

At the close of the first round of tobacco litigation, the industry's position seemed unassailable.⁷⁵ The plaintiffs achieved no victories in the first round of litigation,⁷⁶ while the tobacco companies consistently pummeled plaintiffs with litigation strategies designed to exhaust their comparatively meager resources. Moreover, those who did survive faced the issue of foreseeability of harm in an environment where few were willing to impute the knowledge of the ill-effects of smoking to the tobacco industry. Defendants were also armed with the *Green* decision from the Fifth Circuit Court of Appeals holding that cigarettes were, in fact, merchantable.⁷⁷ By virtue of its successes in legislation and Restatement section 402A, the tobacco industry closed out the initial era of tobacco litigation unscathed.

B. Round Two: Strict Products Liability Revisited

The advent of asbestos litigation and a general public concern for mass tort issues⁷⁸ prompted lawyers to revisit varying theories of products liability in the early 1980s.⁷⁹ Most notably, lawyers keyed on a change in the concept of strict liability that focused on the inherent dangers of a product instead of the foreseeability problems that plagued the warranty cases of the early years.⁸⁰ New concepts of strict liability from influential commentators like Professors John Wade⁸¹ and Donald W. Garner⁸² encouraged plaintiffs to assert that cigarettes

Public Health Cigarette Smoking Act § 5(a)–(b) (emphasis added). The Supreme Court made much of this change in language. See *infra* notes 108–14 and accompanying text.

⁷⁴ 505 U.S. 504 (1992). *Cipollone* presents numerous complex issues of federal preemption that affect tobacco litigation today, including warranty issues arising out of state law. This note will deal with these concepts as they relate to contemporary tobacco litigation in Part IV.A.2.

⁷⁵ See Stein, *supra* note 40, at 646.

⁷⁶ Rabin, *supra* note 40, at 864.

⁷⁷ See *supra* note 50 and accompanying text.

⁷⁸ See TOXIC TORTS AND PRODUCT LIABILITY: CHANGING TACTICS FOR CHANGING TIMES (Michael A. Brown ed., 1989). Brown provides a thorough evaluation of products liability theories involved with the rise of mass tort litigation through the 1980s. Specifically, Brown's work examines asbestos litigation, environmental hazards, radiation injuries, and tobacco litigation. *Id.*

⁷⁹ Rabin, *supra* note 40, at 864.

⁸⁰ *Id.* at 866.

⁸¹ Stein, *supra* note 40, at 646 (citing the following as Professor Wade's significant articles: John Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551 (1980); John Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973); John Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965)). For a

were defective and unreasonably dangerous and thus tobacco companies should be strictly liable for the resulting harm.⁸³

Regardless of the theory, the results were much the same. Large tobacco companies maintained their strategy from the early cases and sought to exhaust the resources of the plaintiffs.⁸⁴ Spurred on by the liability and demise of the asbestos industry, tobacco companies caught a glimpse of the future and responded with a heightened resolution to survive the litigation process.⁸⁵

Although the majority of the second round remained focused on the developing law of mass tort and products liability, plaintiffs continued using breach of warranty claims in their lawsuits.⁸⁶ However, the result was much the same as the first wave of litigation. By this time, section 2-314 of the U.C.C. provided the primary means of asserting a claim for a breach of implied warranty, and among the established defenses to a breach of implied warranty was assumption of risk. A complete understanding of this defense and how it affected litigation may be seen by examining the national perception of smokers and their plight. The established mood at the time was one of great concern for personal health and safety.⁸⁷ Moreover, constant scientific research following the Surgeon General's landmark report in 1964 created a public sense that smoking was clearly damaging to personal health.⁸⁸ As Professor Robert L. Rabin states, "[s]moking, which had seemed such a natural accoutrement of the good life, was now regarded with disdain by many—as an unhealthy sign of a weak character."⁸⁹ It is no wonder, then, why the implied warranty of merchantability supplied no victories to tobacco plaintiffs in this middle round of litigation. Even if a breach of implied warranty claim survived the pretrial litigation marathon, plaintiffs were likely to face a jury that was knowledgeable about the health effects of smoking and probably unsympathetic to the plight of a smoker who likely assumed the risks of his habit. Even worse, a debate was brewing over failure to warn issues, insufficient labeling claims, and the preemptive effect of

contemporary view of product liability under the third Restatement of Torts, see Thomas C. Galligan, Jr., *A Primer on Cigarette Litigation Under The Restatement (Third) of Torts: Products Liability*, 27 SW. U. L. REV. 487 (1998).

⁸² See Stein, *supra* note 40, at 653 (citing Donald W. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423 (1980)).

⁸³ Plaintiffs were also encouraged by a move to a risk-utility analysis of products liability in which plaintiffs could assert the scientific evidence showing the tremendous harm caused by tobacco. See Rabin, *supra* note 40, at 866–67.

⁸⁴ *Id.* at 868.

⁸⁵ *Id.*

⁸⁶ Dietsch Field, *supra* note 40, at 106.

⁸⁷ See Rabin, *supra* note 40, at 864.

⁸⁸ See Stein, *supra* note 40, at 648.

⁸⁹ Rabin, *supra* note 40, at 864.

the federal cigarette labeling acts that would cause even more problems for plaintiffs seeking to recover on warranty claims.

At this point, preemption also became a popular defense in light of the 1965 Act, as amended by the Public Health Cigarette Smoking Act of 1969 ("1969 Act"),⁹⁰ that forbade states from imposing tobacco package labeling requirements on manufacturers.⁹¹ *Cipollone v. Liggett Group, Inc.*⁹² began a journey that would eventually find its way to the United States Supreme Court and mark the end of the second wave of litigation with a disjointed ruling on the preemptive effect of the 1965 and 1969 Acts. The Third Circuit originally addressed the preemptive effect of the 1965 and 1969 Acts and interpreted them broadly to include all of Cipollone's claims.⁹³ This ruling set the stage for the United States Supreme Court case that would mark the beginning of the contemporary era of tobacco litigation.

C. The Contemporary Era⁹⁴

The contemporary era of tobacco litigation is distinguished by two events that set the present round of litigation apart from its predecessors.⁹⁵ The first is the battle over the preemptive effect of the 1965 and 1969 Acts. Although the United States Supreme Court has addressed this issue, the details are far from settled and still play a role in cases today. The second is perhaps the more important,⁹⁶ but initially had little to do with rehashing old products liability issues. Beginning with the "Mr. Butts" document disclosures of 1994,⁹⁷ the tobacco industry has fought a nearly decade-long public relations battle while inside information

⁹⁰ See *supra* note 71 and accompanying text.

⁹¹ See *supra* note 73 (providing the preemptive language of both the 1965 and 1969 Acts).

⁹² 593 F. Supp. 1146 (D.N.J. 1984), *rev'd* 789 F.2d 181, 187 (3d Cir. 1986), *on remand* 649 F. Supp. 664 (D.N.J. 1986).

⁹³ *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 581-83 (3d Cir. 1990) (dismissing plaintiff's claims for failure to warn, breach of express warranty, and intentional tort claims).

⁹⁴ For a thorough history and evaluation of legal theories in the contemporary era of tobacco litigation, see Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465 (1998).

⁹⁵ Other events, such as the advent of class actions, state Medicaid subrogation suits, and second-hand smoke injuries are also important to the current era of tobacco litigation. However, the vilification of the tobacco industry, and the extent to which courts use the preemptive doctrines of *Cipollone*, apply to all tobacco suits in some manner.

⁹⁶ See Cupp, *supra* note 94, at 489-90 (stating that "[n]ew evidence of fraud by tobacco manufacturers is likely the most important factor distinguishing the third wave cases from earlier litigation.").

⁹⁷ See *infra* notes 115-19 and accompanying text (describing the origins of the Mr. Butts documents).

continues to show that the tobacco industry has known for thirty years that cigarettes are dangerous and addictive.⁹⁸

1. *Cipollone, Cigarette Labeling, and Preemption*

Cipollone is particularly notable for its legacy of preemption in interpreting the 1965 and 1969 Acts. Because merchants must properly package and label goods in order for them to be merchantable, the Supreme Court's interpretation of the 1965 and 1969 Acts is crucial to an analysis of the implied warranty of merchantability. If plaintiffs cannot bypass the preemption issues posed by *Cipollone*, then juries will never evaluate the merits of their claims and those causes of action will fail.

Rose Cipollone, a smoker for forty-two years, contracted lung cancer and filed suit against the Liggett Group, Inc., which had manufactured the cigarettes she had smoked.⁹⁹ After Cipollone died from lung cancer in 1984, her husband, Antonio, continued the action as the executor of his wife's estate.¹⁰⁰ The Cipollones' complaint alleged many claims, including strict liability, negligence, breach of warranty, and intentional tort.¹⁰¹ After an interlocutory appeal¹⁰² and a \$400,000 verdict for the Cipollones,¹⁰³ the Third Circuit heard the case for the final time and affirmed the district court's finding of a broad preemptive effect for the 1969 Act.¹⁰⁴ The Court of Appeals found that the 1969 Act preempts "state law damage actions" that "challenge . . . the propriety of a party's actions with respect to the advertising and promotion of cigarettes."¹⁰⁵ Therefore, the "plaintiff's post-1965 failure to warn, express warranty, and intentional tort claims"¹⁰⁶ were preempted because they were based on the "advertising and promotion of cigarettes."¹⁰⁷ The Supreme Court subsequently granted certiorari for review.¹⁰⁸

⁹⁸ See Player, *supra* note 40, at 322.

⁹⁹ Cipollone v. Liggett Group, Inc., 789 F.2d 181, 183 (3d Cir. 1986).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 184.

¹⁰² Cipollone, 789 F.2d at 187-88 (finding that Congress intended to occupy the field of regulating tobacco package labeling with the 1969 Act and remanded the case with instructions for the district judge to determine specifically which claims were preempted by the labeling acts).

¹⁰³ Cipollone v. Liggett Group, Inc., 893 F.2d 541, 546 (3d Cir. 1990).

¹⁰⁴ *Id.* at 582.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 583.

¹⁰⁷ *Id.* at 582.

¹⁰⁸ Cipollone v. Liggett Group, Inc., 499 U.S. 935 (1991).

Justice Stevens produced the most important opinion of the case, although it did not garner a majority of the Court.¹⁰⁹ Stevens found that the preemptive effect of the 1969 Act barred "requirement[s] or prohibition[s]" imposed by state law relating to advertising and promotion of cigarettes,¹¹⁰ and therefore the 1969 Act would preempt most claims arising under state statutes and the common law.¹¹¹ The key question in the analysis is "whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'"¹¹² Justice Stevens concluded that the Cipollone's claims for failure to warn, breach of express warranty, and fraudulent misrepresentation were preempted; however, the state law conspiracy claim remained.¹¹³ Despite the fractured nature of the *Cipollone* decision, most circuits have adopted Justice Stevens's plurality opinion.¹¹⁴

2. Public Disclosure of Confidential Tobacco Industry Documents

In 1994, Merrell Williams, a paralegal with the firm of Wyatt, Tarrant, & Combs in Louisville, Kentucky, shipped a box containing approximately 10,000 documents from Brown & Williamson Tobacco to Professor Stanton Glantz at the University of California, San Francisco.¹¹⁵ These documents contained information indicating that the tobacco industry had known for thirty years that smoking was dangerous and led to many illnesses.¹¹⁶ Moreover, the documents indicated that the tobacco companies manipulated the nicotine levels and

¹⁰⁹ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520 (1992) (Stevens, J., concurring in part and dissenting in part). Oddly, the one opinion that did receive support from seven justices dealt with the preemptive language of the extinct section 5 of the 1965 Act. *Id.* at 519–20 ("[W]e conclude that § 5 of the 1965 [Federal Cigarette Labeling and Advertising Act] only preempted state and federal rulemaking bodies from mandating particular cautionary statements and did not pre-empt state-law damages actions."). For excerpts of the 1965 and 1969 Acts, see *supra* note 73.

¹¹⁰ *Cipollone*, 505 U.S. at 520.

¹¹¹ *Id.* at 522–23.

¹¹² *Id.* at 524 (citing section 5(b) of the Public Health Cigarette Smoking Act of 1969).

¹¹³ *Id.* at 524–30.

¹¹⁴ See *infra* note 148 (citing the Courts of Appeals that adopted Justice Stevens' plurality opinion from *Cipollone*).

¹¹⁵ See Player, *supra* note 40, at 322; see also STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS (1996), available at <http://www.library.ucsf.edu/tobacco/cigpapers/> (last visited Oct. 19, 2002). Another useful source of tobacco documents is Tobacco Documents Online, at <http://tobaccodocuments.org/> (last visited Oct. 19, 2002). The Northeastern University School of Law provides general tobacco information through the Tobacco Control Resource Center, Inc. and The Tobacco Products Liability Project, at <http://www.tobacco.neu.edu/> (last visited Oct. 19, 2002).

¹¹⁶ See Player, *supra* note 40, at 322.

additives in cigarettes in order to increase their addictive nature.¹¹⁷ By disclosing these documents, Merrell Williams, known only as "Mr. Butts,"¹¹⁸ began the wave of public disclosure of inside information that would prove to be a public relations disaster for the tobacco industry.¹¹⁹

The impact of these disclosures and the ensuing public outrage could have a potential impact on breach of implied warranty claims. The first round of litigation was characterized by the successful use of the unforeseeability defense. The problem of foreseeability disappeared with the advent of the implied warranty of merchantability in U.C.C. section 2-314, which did not require the defendant to have foreseen the harm as a condition for imposing liability. Although foreseeability no longer plagued plaintiffs, assumption of risk still played a role in the U.C.C.¹²⁰ In the second round of litigation, the public sentiment remained focused on the voluntary nature of smoking and many felt the ill-effects were the result of the smoker's poor choices.¹²¹ In the present round of litigation, inside information revealing that tobacco companies were dealing in nicotine addiction¹²² strongly challenges the assumption that smokers are responsible for their own behavior and goes far to establish them as victims in the eyes of the public, and subsequently, the jury.¹²³ Divesting tobacco companies' ability to claim assumption of risk as a defense could signify the loss of substantial firepower for these companies in the current era of litigation. The implications of this shift in public sentiment are further explored in the next section as they relate to today's use of the U.C.C.'s implied warranty of merchantability.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ These revelations led to a new legal approach based on fraud, deceit, and conspiracy. See Dietsch Field, *supra* note 40, at 122. Minnesota's state action against the tobacco industry is an example of these new claims resulting from the disclosure of confidential tobacco industry information. See *State of Minnesota, Private Insurer Sues Tobacco Companies*, WASH. POST, Aug. 18, 1994, at A4. Minnesota Attorney General Hubert Humphrey III filed the first action of its kind by a state alleging industry antitrust and consumer fraud violations. *Id.* Humphrey's comments concerning the lawsuit summarized the shift towards holding tobacco companies responsible for their past misconduct instead of focusing on the legal quagmire of products liability and the personal responsibility of individual smokers. Upon filing the suit, Humphrey succinctly stated "[p]revious lawsuits have said the tobacco companies should pay because their products are dangerous. This lawsuit says they should pay because the conduct . . . is illegal." *Id.*

¹²⁰ See WHITE & SUMMERS, *supra* note 19, § 11-8, at 408-09.

¹²¹ See *supra* notes 88-89 and accompanying text.

¹²² See GLANTZ, *supra* note 115, at 58-60.

¹²³ See Cupp, *supra* note 94, at 489-90.

IV. THE IMPLIED WARRANTY OF MERCHANTABILITY AND RELATED ISSUES FACED BY TODAY'S LITIGANTS

The successive parts of this article are intended to build on one another. First, the implied warranty of merchantability and the general issues surrounding its general applications are explored. Next, the note provides the history of the tobacco cases and how implied warranty theories fared throughout the three waves of litigation. Then, the note discusses the issues presented by the implied warranty of merchantability and tobacco litigation as they apply to cases today. Here, this note will identify the main issues faced by current litigants and provide commentary concerning legal pitfalls and some useful insight on where the legal theory is heading.

A. The Gatekeepers: The Statute of Limitations and Evolving Concepts of Preemption

All litigants face certain dispositive and significant threshold issues that have nothing to do with the merits of their claims or legal theories. For today's tobacco litigants, the statute of limitations and questions of federal and state law preemption can end a plaintiff's case before a judge even determines whether a plaintiff has stated a proper claim or whether a jury has the opportunity to decide the merits. Both issues initially seem relatively simple, but the way the courts have handled these matters is not entirely intuitive. A detailed description of today's law as it is applied to the tobacco cases follows.

*1. The U.C.C. Statute of Limitations*¹²⁴

If one considers the application of the implied warranty of merchantability to the sale of an automobile, for example, the application of the statute of limitations

¹²⁴ See *supra* Part II.C (providing a basic description of the four-year statute of limitations imposed under section 2-725 of the U.C.C.). Some state legislatures have enacted statutes of repose that create an absolute bar to any action brought after the expiration of a specified period of time. See, e.g., TENN. CODE ANN. § 29-28-103(a) (2001) (creating a ten-year limitation, beginning when the product was first purchased, for recovery on personal injury claims arising from a defective product, with the exception of asbestos and silicone breast implant injuries). These statutes are often aimed at products liability actions and some courts find that statutes of repose are not subject to any equitable tolling. See *Greene v. Brown & Williamson Tobacco Corp.*, 72 F. Supp. 2d 882, 886 (W.D. Tenn. 1999). Moreover, statutes of repose are generally constitutional, even though they bar causes of action before they accrue. *Id.* Although the *Greene* court did not specifically apply the Tennessee rule of repose to warranty claims, the issue may be applicable to tobacco cases. In *Spain v. Brown & Williamson Tobacco Corp.*, 230 F.3d 1300 (11th Cir. 2000), the Eleventh Circuit Court of Appeals certified questions to the Supreme Court of Alabama regarding the applicability of its statute of repose to tobacco liability cases. *Id.* at 1312. The Supreme Court of Alabama has yet to issue its opinion.

is simple—buyers must bring suit for the breach of the implied warranty within four years of the date of tender of delivery.¹²⁵ Thus, if buyers discover a breach of the implied warranty of merchantability, then they must bring suit within four years from the time they take physical possession of their car, or they are barred by the statute of limitations. Cigarettes, on the other hand, provide a more complex issue. For individuals who have smoked countless cigarettes over their lifetimes, it would be impossible to determine which sales of cigarettes proximately caused the smokers' respective diseases. Furthermore, if one could determine which cigarettes resulted in injury, it is likely that all claims would be barred because the disease would likely not manifest itself until after the four-year period for bringing suit. To cope with this difficult situation and ensure that plaintiffs still have an opportunity to bring a timely claim upon discovering their smoking-related illness, the courts have fashioned different methods of applying the U.C.C.'s four-year statute of limitations.

Of the courts that have addressed the statute of limitations concerning tobacco-related claims, most conclude that the cause of action for a breach of implied warranty accrues when the plaintiff last purchased cigarettes manufactured by the particular defendant.¹²⁶ The Fifth Circuit Court of Appeals addressed the U.C.C. statute of limitations as it applies to smoking-related claims in *Allgood v. R.J. Reynolds Tobacco Co.*¹²⁷ Allgood was a lifetime smoker of forty-eight years beginning in 1941 with "Camel" cigarettes manufactured by R.J. Reynolds.¹²⁸ No later than 1956, Allgood switched to the "Pall Mall" brand of cigarettes manufactured by American Tobacco.¹²⁹ Allgood contracted lung cancer and died in 1989, and his wife filed suit in 1991.¹³⁰ The trial court noted that Allgood's claims concerning R.J. Reynolds were barred by the U.C.C. statute of limitations because a breach of implied warranty occurred on tender of delivery and Allgood never alleged in his pleadings that he purchased cigarettes manufactured by R.J. Reynolds after 1956, well outside the statutory four-year period.¹³¹ On appeal, the Fifth Circuit affirmed the trial court's reasoning concerning the statute of limitations. The Court noted "[u]nder Texas law,

¹²⁵ As to merchants, tender of delivery occurs when then buyer is in physical possession of the goods, unless the parties agree otherwise. U.C.C. § 2-509(3) (2000).

¹²⁶ It is important to note that plaintiffs often join several tobacco manufacturers because they have smoked several brands of cigarettes manufactured by several different tobacco companies. Thus, plaintiffs should be careful in their pleadings not to bring claims for a breach of warranty against a specific manufacturer if the plaintiffs have not smoked that particular manufacturer's products within the four years prior to the lawsuit.

¹²⁷ 80 F.3d 168 (5th Cir. 1996).

¹²⁸ *Allgood v. R.J. Reynolds Tobacco Co.*, No. H-91-0158, 1994 U.S. Dist. LEXIS 20932, at *3-4 (S.D. Tex. Nov. 7, 1994).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at *18-22.

warranty claims accrue on the date of sale and the statute of limitations extends for four years.”¹³² Other courts have reached similar conclusions.¹³³

At least one other court has reached a different position. In *Shropshire v. American Tobacco Co.*,¹³⁴ the court held that the cause of action accrued at the time the plaintiff learned he had a smoking-related illness.¹³⁵ Shropshire, a lifetime smoker from his teenage years, was diagnosed with Beurger’s disease in 1973.¹³⁶ At the time of the diagnosis, Shropshire’s doctors advised him that smoking was a likely cause of the injury and advised him to quit.¹³⁷ Although Shropshire heeded that advice, he resumed smoking in 1980 and his health deteriorated considerably, resulting in a lawsuit.¹³⁸ While the Tennessee Court of Appeals acknowledged the general rule in Tennessee regarding tender of delivery as the date the action accrues,¹³⁹ the court nonetheless held that the statute of limitations contained in U.C.C. section 2-725 began to run in 1973 when Shropshire learned of his smoking-related illnesses.¹⁴⁰ In making its holding, the court particularly noted Shropshire’s affirmative knowledge that he had an injury related to smoking in 1973 and yet failed to take action; therefore, the statute of limitations barred his recovery.¹⁴¹

¹³² *Allgood*, 80 F.3d at 171.

¹³³ See, e.g., *Floyd v. Brown & Williamson Tobacco Corp.*, 159 F. Supp. 2d 823, 831 (E.D. Pa. 2001) (“Since there are no allegations in the Complaint that plaintiff purchased or smoked cigarettes after 1989, the Court holds that the limitations period for a breach of implied warranty ran in 1993, and plaintiff’s breach of implied warranty claim is therefore barred.”); *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 2d 539, 550–51 (D. Md. 1997) (involving a second-hand smoke case where the plaintiff failed to allege that the cigarettes which harmed him were purchased within the four-year limitations period); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 435 (Tex. 1997) (“The four-year statute of limitations on implied warranties began to run at the time of delivery, not when Grinnell discovered he had cancer.”).

¹³⁴ No. 1143, 1988 Tenn. App. LEXIS 250 (Tenn. Ct. App. Apr. 19, 1988).

¹³⁵ *Id.* at *5–6.

¹³⁶ *Id.* at *2.

¹³⁷ *Id.* at *2–3.

¹³⁸ *Id.*

¹³⁹ *Id.* at *5–6 (citing *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487, 491 (Tenn. 1975)).

¹⁴⁰ *Shropshire v. Am. Tobacco Co.*, No. 1143, 1988 Tenn. App. LEXIS 250, *6 (Tenn. Ct. App. Apr. 19, 1988).

¹⁴¹ *Id.* Courts will often haggle over discovery issues relating to latent diseases and whether plaintiffs either knew or should have known of their injury. Here, Shropshire’s physicians specifically informed him that his injuries were smoking-related, and he took no action against the manufacturers for twelve years. In fact, the Tennessee Court of Appeals noted that their application of U.C.C. section 2-725 was somewhat lenient compared to other discovery rules which begin the statutory period even when the plaintiff may not know of all the possible adverse affects of the injury. *Id.* at *7.

Although the Fifth Circuit Court of Appeals was willing to apply Texas law concerning the statute of limitations in *Allgood*, the Eleventh Circuit Court of Appeals has recently decided to certify this question, among others, to the Alabama Supreme Court for resolution in *Spain v. Brown & Williamson Tobacco Corp.*¹⁴² The Eleventh Circuit noted that several tests may apply to determining when a cause of action accrues, especially in the context of tort claims.¹⁴³ The court ultimately determined that this state-law decision was best left to the Alabama Supreme Court,¹⁴⁴ which has yet to issue its opinion.

Plaintiffs have attempted, albeit in vain, to convince the courts to adopt an equitable tolling of the statute of limitations as it applies to breach of warranty cases. A Maryland district court has held that equitable principles commonly applied to discovery of tort claims are inapplicable to suits for a breach of warranty arising under the U.C.C.¹⁴⁵ Rather, ““§ 2-725 means just what it says: a warranty action must be brought within four years of the tender of the goods forming the basis of the warranty.””¹⁴⁶ Therefore, plaintiffs should not expect tremendous success in convincing a court to apply equitable principles to U.C.C. section 2-725.

2. Cipollone and Its Progeny

Despite the seemingly inconclusive opinion rendered by the Supreme Court in *Cipollone*,¹⁴⁷ most courts have followed Justice Stevens’s plurality opinion interpreting the current version of the 1969 Act and its preemptive language.¹⁴⁸ In

¹⁴² 230 F.3d 1300, 1312 (11th Cir. 2000).

¹⁴³ *Id.* at 1305–06. The *Spain* court noted:

The Alabama Supreme Court has yet to address statute of limitations issues in the context of a cigarette products liability case, and it is uncertain whether the “completed wrong” sufficient to begin the running of the applicable limitations period occurs at the time of addiction to cigarette smoking, the time of the last exposure to cigarette smoke, the time a smoking-related illness or injury is diagnosed, or some other time.

Id.

¹⁴⁴ *Id.* at 1306–07, 1312 (citation omitted). *Spain* explores many common issues facing tobacco litigants today, and the Court of Appeals certified many of those questions to the Alabama Supreme Court. Thus, *Spain* is likely to become a leading case in contemporary tobacco litigation.

¹⁴⁵ *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 539, 550–51 (D. Md. 1997).

¹⁴⁶ *Id.* (quoting *Mills v. Int’l Harvester Co.*, 554 F. Supp. 611, 612 (D. Md. 1982)).

¹⁴⁷ See *supra* Part III.C.1.

¹⁴⁸ See *Jones v. Vilsack*, 272 F.3d 1030, 1034 (8th Cir. 2001); *Spain*, 230 F.3d at 1304–05; *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 347–49 (6th Cir. 2000); *Lindsey v. Tacoma-Pierce County Health Dep’t.*, 195 F.3d 1065, 1071–72 (9th Cir. 2000); *Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 69–70 (1st Cir. 1997); *Allgood*, 80 F.3d at 171 (preempting

Cipollone, Justice Stevens proposed the following test for determining whether the 1969 Act preempts a state law imposed on the tobacco industry:

The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion," giving that clause a fair but narrow reading. As discussed below, each phrase within that clause limits the universe of common-law claims pre-empted by the statute.¹⁴⁹

Section 2-314 of the U.C.C. lists several minimum requirements that an item must fulfill in order to be merchantable.¹⁵⁰ Among them is the requirement that goods must be properly labeled and packaged. When plaintiffs allege that cigarettes are not merchantable because they are not properly labeled or packaged, they run into problems.

Most courts have little difficulty holding that the plurality opinion in *Cipollone* places any claim concerning packaging and labeling in direct conflict with section 5(b) of the 1969 Act.¹⁵¹ More specifically, courts will address the

certain claims with a citation to Stevens's plurality opinion); *Michael v. Shiley, Inc.*, 46 F.3d 1316, 1322 n.3 (3d Cir. 1995) ("We recognize that *Cipollone* was decided by a plurality of the Supreme Court. We are satisfied that the pre-emption discussion and holding represents the Court's current pre-emption analysis."); *Magnus v. Fortune Brands, Inc.*, 41 F. Supp. 2d 217, 222 (E.D.N.Y. 1999); *Shaw*, 973 F. Supp. at 544-45; *Griesenbeck v. Am. Tobacco Co.*, 897 F. Supp. 815, 822-23 (D.N.J. 1995); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1518-21 (D. Kan. 1995).

¹⁴⁹ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523-24 (1992) (involving a plurality opinion that quotes portions of section 5(b) of the 1969 Act). Judge Gershon in *Magnus v. Fortune Brands, Inc.* interpreted Justice Stevens's analysis as a four part test, stating:

the Court devised the following test for determining whether a common law claim is preempted pursuant to the statute: Preemption is required whenever the predicate legal duty underlying the claim constitutes a(1) [sic] requirement or prohibition, (2) based on smoking and health, (3) imposed under state law, (4) with respect to the advertising or promotion of cigarettes.

Magnus, 41 F. Supp. 2d at 222.

¹⁵⁰ See *supra* Part II.A.2.

¹⁵¹ See *Johnson v. Brown & Williamson Tobacco Corp.*, 122 F. Supp. 2d 194 (D. Mass. 2000):

To the extent that Johnson's claim for breach of the implied warranty of merchantability is based on the alleged failure to warn about the health effects of cigarettes [by including sufficient safety instructions in the packaging], it relies on a state-law requirement that B[rown] & W[illiamson] include statements regarding the relationship between smoking and health in its advertising. . . . Johnson's breach of warranty claim based on failure to warn is therefore preempted by the 1969 Act.

Id. at 202; see also *Geiger v. Am. Tobacco Co.*, 674 N.Y.S.2d 775, 778 (N.Y. App. Div. 1998) (stating that "so much of [the plaintiffs'] causes of action to recover damages for . . . implied

pleadings and the way plaintiffs allege the breach of warranty. To the extent that the pleadings show a claim based on improper labeling and packaging, the courts find preemption. In the alternative, if the plaintiff further alleges a breach of the implied warranty of merchantability based on some sort of defect, then the court will likely not find preemption as such claims have nothing to do with advertising and promotion of cigarettes.¹⁵² Keeping in mind that U.C.C. section 2-314(2) provides a list of minimum requirements, the plaintiff need only show that the cigarettes do not meet one of the requirements listed in the statute. Therefore, plaintiffs should avoid section 2-314(2)(e), which addresses packaging of goods, and instead focus their allegations on the application of section 2-314(2)(a)–(d), which apply to the specific defects of the cigarette itself.

Finally, the practitioner should be aware that a few courts take positions that are at the ends of the preemption spectrum as opposed to the middle ground achieved by most courts. In *Perez v. Brown & Williamson Tobacco Corp.*,¹⁵³ a Texas district court found that common law claims, including implied warranty claims, are completely preempted by *Cipollone* because such claims are “predicated on duties based on smoking and health.”¹⁵⁴ In a later proceeding

warranty of merchantability . . . [that] are based on . . . the neutralization through advertising of Federally-mandated warnings . . . are preempted”).

¹⁵² In the alternative, courts often find that implied warranty claims survive a preemptive analysis under *Cipollone* because the plaintiff’s allegations focus on the defective nature of the goods and not problems with labeling, warning, advertising, or promotion. See *McLean v. Philip Morris, Inc.*, Nos. 2:96CV167-DF, 5:97CV-117, 1999 U.S. Dist. LEXIS 13551, at *32–34 (E.D. Tex. Aug. 13, 1999) (“The Plaintiffs’ breach of implied warranty claims are not preempted to the extent they are unrelated to advertising and promotion.”); *Labelle v. Brown & Williamson Tobacco Corp.*, C.A. No. 2:98-3235-23, 1999 U.S. Dist. LEXIS 21629, at *18–19 (D.S.C. Mar. 19, 1999) (“Therefore, plaintiffs’ claim for breach of implied warranty would not be pre-empted to the extent that it is based on something other than the failure to disclose information related to health and smoking. . . .”); *Castano v. Am. Tobacco Co.*, 870 F. Supp. 1425, 1434 (E.D. La. 1994) (“The Court finds that the duty imposed under the implied warranty [of merchantability] is not one ‘based on advertising and promotion.’ It is based instead on defendants’ manufacture and sale of the cigarettes . . . regardless of whether defendants advertise or promote them.”); *Appavoo v. Phillip Morris Inc.*, No. 122469/97, 1998 N.Y. Misc. LEXIS 220, at *8 (N.Y. Sup. Ct. June 22, 1998) (“A breach of the implied warranty of merchantability is based on the general warranty that a product is fit for us, and thus is independent of ‘advertising or promotion.’ Accordingly, this claim is not preempted under the test set forth in *Cipollone*.”).

¹⁵³ No. C-97-070, 1997 U.S. Dist. LEXIS 7346 (S.D. Tex. Mar. 18, 1997).

¹⁵⁴ *Id.* at *9. The district court further based its reasoning on the Fifth Circuit’s decision in *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996). The *Perez* court concluded that the Fifth Circuit had found all claims based on implied warranties, *inter alia*, were preempted under *Cipollone*. *Perez*, 1997 U.S. Dist. LEXIS 7346, at *9. Your author has scoured the *Allgood* decision and is at a loss to find where the Fifth Circuit addressed implied warranties and federal preemption. The *Allgood* court quite clearly disposed of the warranty against the cigarette manufacturers using the statute of limitations. *Allgood*, 80 F.3d. at 171. At least one other court disagrees with reading *Allgood* as having a broad preemptive effect. See

concerning *Perez*, the district court further held that “[b]asically, Plaintiffs’ claim[] of . . . breach of implied warranties [is a] claim[] alleging that the Defendants misrepresented and concealed the health risks of cigarette smoking. The Court FINDS [sic] that all of these claims . . . stem from duties based on smoking and health [and are therefore barred].”¹⁵⁵ Although this is a harsh approach to the *Cipollone* preemption issue, it also appears to be somewhat unique. The cases following the middle ground tend to dominate.

3. A New Form of Preemption: State Products Liability Laws

Just when it appeared plaintiffs were safe from the preemptive effects of *Cipollone* with respect to allegations that cigarettes are not fit for their ordinary purposes, a new form of preemption has surfaced that has the potential to derail warranty claims. In varying ways, state legislatures have sought to codify their products liability law.¹⁵⁶ Some statutes purport to combine all actions resulting in personal injury under tort claims for strict products liability. This proposition can create an enormous problem for plaintiffs as the language of these statutes appears to deny them a claim under the state’s warranty law. Cases from Texas and Ohio provide an illustration.

The Texas Products Liability Act (“TPLA”) sets out the requirements for determining whether a plaintiff can recover for personal injury resulting from use of a manufactured product. Any attempt to recover for personal injury using a breach of implied warranty claim, *inter alia*, is considered a “products liability action” under the TPLA.¹⁵⁷ Furthermore, the Texas legislature went on to declare that manufacturers in a “products liability action,” which necessarily involves any claim for personal injury resulting from a breach of implied warranty, cannot be

LaBelle, 1999 U.S. Dist. LEXIS 21629, at *18 (“Defendants first cite *Allgood* as a case in which a claim for breach of implied warranty was pre-empted—however, *Allgood* did nothing of the kind. The warranty claims at issue in *Allgood* were dismissed for the following separate reasons: . . . [they] were barred by the statute of limitations.”).

¹⁵⁵ *Perez v. Brown & Williamson Tobacco Corp.*, 967 F. Supp. 920, 928 (S.D. Tex. 1997).

¹⁵⁶ See OHIO REV. CODE ANN. § 2307.71–80 (Anderson 2001); TENN. CODE ANN. § 29-28-101 to -108 (2000); TEX. CIV. PRAC. & REM. CODE ANN. § 82.001–.006 (Vernon 1997).

¹⁵⁷ TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(2). This definition of a products liability action seemingly throws the concept of implied warranty into the world of products liability on tort and re-works the U.C.C. framework for recovering damages. Note that sellers can recover for personal injury resulting from breach of warranty under the U.C.C. See U.C.C. § 2-715 (2)(b) (2001) (allowing for recovery of consequential damages related to breach of warranty). The Texas statute, however, seems to require anyone seeking recovery for personal injury to bring his claims under the products liability statute, thus cutting off the plaintiff’s ability to recover damages for personal injury under the U.C.C. TEX. CIV. PRAC. & REM. CODE ANN. § 82.001–.006.

liable if the product is commonly known to be inherently unsafe and the product is a common consumer good, like tobacco.¹⁵⁸ The result is that anyone seeking to assert an implied warranty claim based on injuries suffered from smoking cigarettes must contend with the requirements of the TPLA. The following cases provide the judicial interpretations as they apply to tobacco litigation.

Although a textual reading of the TPLA would seem to preempt any attempt to recover for personal injuries resulting from smoking under the U.C.C., the Texas courts have generally found that the implied warranty of merchantability, as it relates to the unknown dangers of nicotine addiction, survives the preemptive analysis. In *McLean v. Philip Morris, Inc.*,¹⁵⁹ a Texas district court found that the TPLA did not require plaintiffs seeking recovery for a breach of U.C.C. section 2-314 to limit their claims to those allowed by the TPLA. Rather, the plaintiff's claim survived to the extent it alleged a defective condition of cigarettes in relation to the unknown dangers of nicotine addiction.¹⁶⁰

The Ohio Products Liability Act ("OPLA")¹⁶¹ provides a statute with a similar concept as that of the TPLA. Like Texas, the Ohio statute defines a "product liability claim" as a civil action seeking recovery of damages for personal injury and property damage resulting from, *inter alia*, "[a]ny failure of

¹⁵⁸ § 82.004(a). This section states that products manufacturers will not be liable if:

(1) the product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge to the community; and

(2) the product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter, as identified in Comment i to Section 402A of the Restatement (Second) of Torts.

Id. It is also important to note that while claims based on express warranties are "products liability actions," plaintiffs are not bound by the requirements in section 82.004(a). *Id.* § 82.004(b).

¹⁵⁹ *McLean v. Philip Morris, Inc.*, Nos. 2:96CV167-DF, 5:97CV-117, 1999 U.S. Dist. LEXIS 13551 (E.D. Tex. Aug. 13, 1999).

¹⁶⁰ *Id.* at *40, 43. *Contra* *Perez v. Brown & Williamson Tobacco Corp.*, No. C-97-070, 1997 U.S. Dist. LEXIS 7346 (S.D. Tex. Mar. 17, 1997). In *Perez*, a Texas district court specifically concluded that the definition of "products liability action" included claims for breach of implied warranty and thus the plaintiff was barred from recovery because it was common knowledge that cigarettes were inherently dangerous and they were a common consumer product. *Id.* at *10-11. It is also interesting to note that the plaintiff claimed that the breach of implied warranty "sound[ed] in contract [but] . . . the statute falls with[in] the title 'Liability in Tort.'" *Id.* at *10. The court had little problem with this distinction and instead concluded that the definition of "products liability action" was sufficiently broad to cover any action against a manufacturer resulting in personal injury. *Id.* at *10-11. Therefore plaintiffs would be in error if they looked to the U.C.C. for a remedy to personal injury for a breach of the implied warranty of merchantability. In this way, the preemptive effect of the TPLA seems anything but certain.

¹⁶¹ OHIO REV. CODE ANN. § 2307.71-.80 (Anderson 2001).

that product to conform to any relevant representation or warranty.”¹⁶² Also like Texas, any Ohio plaintiff asserting a “products liability claim” must contend with restrictions outlined in the remainder of the OPLA.¹⁶³

One crucial difference between Ohio and Texas derives from the judicial interpretations of the respective acts. While Texas refrains from a literal interpretation of the TPLA preemptive language, the Ohio courts appear to take an opposite approach. In *Nadel v. Burger King Corp.*,¹⁶⁴ the Ohio Court of Appeals found that the language of the OPLA preempted any recovery for personal injury under the implied warranty theories of the U.C.C. The plaintiffs, claiming damages for second-degree burns resulting from spilled coffee purchased at a fast-food franchise, alleged in part that the coffee was not merchantable under section 2-314 of the U.C.C.¹⁶⁵ After examining previous holdings¹⁶⁶ and the language of the OPLA,¹⁶⁷ the court concluded that “claims for personal injuries caused by a product’s failure to conform due to a defect is governed solely by the Products Liability Law [OPLA].”¹⁶⁸ Thus, it appears that the Ohio courts generally will find that any claim to recover damages for personal and property injury must be brought in accordance with the OPLA.¹⁶⁹ Needless

¹⁶² *Id.* § 2307.71(M)(3) (defining a “products liability claim”).

¹⁶³ *See id.* § 2307.72 (limiting recoverable damages); § 2307.73 (requiring plaintiffs to show a product defect in order to recover).

¹⁶⁴ 695 N.E.2d 1185 (Ohio Ct. App. 1997).

¹⁶⁵ *Id.* at 1187–88. The reader should also note that Ohio has not adopted a form of numbering its statutes that is consistent with the standard printing of the U.C.C. Although identical to U.C.C. section 2-314, Ohio’s version is found at section 1302.27 of the Ohio Revised Code.

¹⁶⁶ *See Saylor v. Providence Hosp.*, 680 N.E.2d 193, 196 n.8 (Ohio Ct. App. 1996) (finding that breach of warranty claims are governed by the OPLA).

¹⁶⁷ The court first noted that section 2307.73(A) of the Ohio Revised Code required plaintiffs to establish a defective condition of the product when bringing a “products liability claim” and then reviewed the definition of a “products liability claim,” which included any action to recover compensatory damages for, *inter alia*, a failure to conform to any warranty. *Nadel*, 695 N.E.2d at 1190.

¹⁶⁸ *Id.*

¹⁶⁹ Although Ohio courts have not addressed the application of U.C.C. section 2-314 to cigarettes, they have applied the preemptive effect of the OPLA to common law claims against the tobacco companies. Most recently, the Sixth Circuit Court of Appeals addressed what it believed to be the common law implied warranty of merchantability under Ohio law, and found that it survived the preemptive effect of the OPLA. In *Tompkin v. American Brands*, 219 F.3d 566, 575 (6th Cir. 2000), the Court of Appeals first found that the Ohio Supreme Court declared that the OPLA only preempted those causes of action that were specifically stated in the OPLA. *Carrel v. Allied Products Corp.*, 677 N.E.2d 795, 800 (Ohio 1997). Despite the Ohio Supreme Court’s declaration that the common law tort theory of implied warranty of merchantability had merged with the strict products liability claims in *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 270 (Ohio 1977), the Sixth Circuit elected to follow an Ohio Court of Appeals decision, *White v. DePuy, Inc.*, 718 N.E.2d 450, 456 (Ohio Ct. App. 1998), both declaring that the common law

to say, the extent to which states have codified their products liability laws, and the ensuing interpretations of such laws, will govern how plaintiffs approach their claims in certain jurisdictions. If Ohio is a representative example, some states are moving in a direction that will allow recovery only for personal and property damage for tort claims under state law governing products liability actions.¹⁷⁰

B. *Merchantability as a Matter of Law*

Bringing a timely action and surviving a preemptive analysis under both *Cipollone* and state products liability law represents a major hurdle for tobacco litigants. If plaintiffs survive this far, they must also properly allege a claim for breach of the implied warranty of merchantability to survive a judgment on the pleadings and potentially proceed to the promised land of a jury trial. The essential element of a tobacco litigation claim is whether the plaintiff alleges a sufficient defect in cigarettes. The following cases explore the nuances that courts

tort of breach of implied warranty of merchantability survived the OPLA and reversing the district court's dismissal of this claim. *Tompkin*, 219 F.3d at 575-76. This holding is particularly troubling when considering that other courts applying Ohio law have concluded that the common law implied warranty of merchantability no longer exists in light of the Ohio Supreme Court's ruling in *Temple*. See *Worthington v. R.J. Reynolds Tobacco Co.*, No. C-2-97-261, 1998 U.S. Dist. LEXIS 23302, at *25-27 (S.D. Ohio Sept. 30, 1998); *Hollar v. Philip Morris, Inc.*, 43 F. Supp. 2d 794, 807-08 (N.D. Ohio 1988).

The *Tompkin* decision remains, although it is not entirely clear how the Sixth Circuit Court of Appeals would treat an implied warranty of merchantability claim brought under section 2-314 of the U.C.C. The language of Ohio Revised Code section 2307.71(M)(3) deems any attempt to recover under any warranty theory a "products liability claim" without distinguishing between theories in tort versus theories in contract under the U.C.C. However, it would appear that the Ohio Supreme Court will have to clarify the meaning of section 2301.71(M) or the Ohio General Assembly must specifically state that the OPLA preempts U.C.C. section 2-314 in order to convince the Sixth Circuit Court of Appeals that the OPLA preempts recovery under all warranty theories.

¹⁷⁰ The question that remains is what is left of U.C.C. section 2-715, which governs recovery of damages for breach of warranty. In Ohio, recovery for personal and property damage under the U.C.C. seemingly does not survive the OPLA; recovery for loss of the buyer's bargain and other consequential damages apparently does. For example, if a sole proprietor's delivery truck breaks down as a result of an unmerchantable transmission, and the owner suffers damages from the non-delivery of merchandise, then this would not be a claim for personal or property damage, and the plaintiff would not be bound by the OPLA. According to section 2-715, the buyer of the truck is entitled to recover both for the defective transmission (the difference between the actual transmission and the transmission as warranted) and the loss of profits suffered as a result. See *CRANDALL ET AL.*, *supra* note 36, § 7.9, at 7:64. However, the plaintiff is subject to U.C.C. section 2-715(2)(a), which limits recovery of consequential damages to those foreseeable to both parties at the time of contracting. See, e.g., *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Court of Exchequer 1854). Thus, the plaintiff would have to show that the loss resulting in the non-delivery of the goods was foreseeable to the seller of the delivery truck at the time of contracting.

have developed in this regard. With the added twist of the Cigarette Papers and other inside disclosures,¹⁷¹ new questions have arisen that challenge the meaning of merchantability with respect to what the public has known about cigarettes and health during the last fifty years. These issues are explored below.¹⁷²

*Spain v. Brown & Williamson Tobacco Corp.*¹⁷³ stands for the proposition that a complaint merely stating that cigarettes are unmerchantable under U.C.C. section 2-314 because their use results in disease is not a sufficient defect.¹⁷⁴ In his complaint, Spain alleged that cigarettes were not merchantable under the U.C.C. because they were unreasonably dangerous. The Eleventh Circuit Court of Appeals found that Alabama law makes a notable distinction between claims alleged in tort and those brought in contract under the U.C.C.¹⁷⁵ Although plaintiffs may advance a products liability theory for their claims relating to the carcinogenic effects of smoking, they have no claim in a pure commercial sense under U.C.C. section 2-314 that cigarettes are unmerchantable.¹⁷⁶ Therefore, in

¹⁷¹ See *supra* Part III.C.2; see also *Jones v. Am. Tobacco Co.*, 17 F. Supp. 2d 706, 710–14 (N.D. Ohio 1998) (outlining the plaintiffs' complaint that gave a chronology of seemingly sinister behavior from the tobacco industry).

¹⁷² Before continuing, the reader should understand that the majority of tobacco cases will be handled in the federal courts because the tobacco defendant generally seeks removal from state courts on diversity grounds. 28 U.S.C. § 1441 (2000). Thus, the majority of tobacco cases are governed by federal judges applying their interpretations of state law with the occasional certification of issues to the relevant state supreme court. See, e.g., *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

¹⁷³ 230 F.3d 1300 (11th Cir. 2000) (applying Alabama law).

¹⁷⁴ *Id.* at 1310–11.

¹⁷⁵ *Id.* at 1310 (citing *Shell v. Union Oil Co.*, 489 So. 2d 569, 571 (Ala. 1986)). The *Shell* case provides an important analysis of the difference between a tort claim involving a products liability action and one involving recovery in contract under the U.C.C. In *Shell*, the plaintiff came into contact with benzene, a chemical known to cause leukemia after prolonged exposure. *Shell*, 489 So. 2d at 570. The plaintiff filed suit alleging that benzene was not merchantable under U.C.C. section 2-314 because it was unreasonably dangerous. The court first noted that the plaintiff's claim that benzene was unreasonably dangerous was clearly a products liability claim sounding in tort and not a proper claim in contract under the U.C.C. *Id.* at 571. The implied warranty of merchantability under the U.C.C. was one of commercial standards; therefore, if the benzene was fit for commercial use, then it was merchantable. To hold otherwise would "ignore[] the clear distinction between causes of action arising under tort law and those arising under the U.C.C. as adopted in Alabama." *Id.* For additional thoughts on the schism between contract and tort law, see *infra* note 215.

¹⁷⁶ *Spain v. Brown & Williamson Tobacco Corp.*, 230 F.3d 1300, 1310–11 (11th Cir. 2000). For other cases following the concepts outlined in *Spain*, see *Green v. Am. Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969) (adopting *Green v. Am. Tobacco Co.*, 391 F.2d 97, 110 (5th Cir. 1968) (reasoning that cigarettes are not defective and do not breach any warranties of merchantability)); *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 94 (N.D.N.Y. 2000); *Arkansas Carpenters' Health & Welfare Fund v. Philip Morris, Inc.*, 75 F. Supp. 2d 936, 945 (E.D. Ark. 1999) ("[I]t is plaintiff's claim that a typical cigarette, like all cigarettes, is 'generally defective.' This type of allegation cannot state a claim for breach of implied warranty

order for plaintiffs to allege a breach of the implied warranty of merchantability under section 2-314, they must state that the cigarettes "were commercially unfit or unsuitable for smoking."¹⁷⁷ This interpretation of merchantability is a considerably higher standard for plaintiffs to achieve because they cannot rely on the link between smoking and health to allege that cigarettes are unmerchantable.

Other courts take a broader view of what is merchantable and will allow claims under U.C.C. section 2-314 to survive a judgment on the pleadings so long as plaintiffs allege some defect with cigarettes, regardless of whether it points to a problem of commercial fitness or unreasonable danger. In *Wright v. Brooke Group Ltd.*,¹⁷⁸ the plaintiff survived a 12(b)(6) motion under the Federal Rules of Civil Procedure by alleging that the defendant's cigarettes were unmerchantable under section 2-314 of the U.C.C. because they were carcinogenic and addictive.¹⁷⁹ When compared with the preceding logic in *Spain*, it seems the mere allegation of a carcinogenic effect is not a sufficient defect creating a breach of section 2-314. Other courts, however, have reached conclusions similar to *Wright* and have allowed plaintiffs to proceed to discovery on the theory that cigarettes are defective not because they are commercially unfit to smoke, but because they result in great personal injury.¹⁸⁰

of merchantability."); *LaBelle v. Brown & Williamson Tobacco Corp.*, No. 2:98-3235-23, 1999 U.S. Dist. LEXIS 21629, at *32-39 (D.S.C. Mar. 18, 1999); *Little v. Brown & Williamson Tobacco Corp.*, No. 2:98-18979-23, 1999 U.S. Dist. LEXIS 21630, *26-32 (D.S.C. Mar. 3, 1999); *Watkins v. R.J. Reynolds Tobacco Co.*, No. 98-130, 1998 U.S. Dist. LEXIS 23328, at *6-7 (E.D. Ky. Oct. 14, 1998); and *Semowich v. R.J. Reynolds Tobacco Co.*, 8 U.C.C. Rep. Serv. 2d 976, 979-80 (N.D.N.Y. 1988).

¹⁷⁷ *Spain*, 230 F.3d at 1310. *Spain* is currently awaiting response to several certified questions from the Alabama Supreme Court. The Eleventh Circuit certified five questions and "invited" the Alabama Supreme Court to notify it if the court was incorrect in a number of its conclusions reached in *Spain*. The Eleventh Circuit requested comment, although not certification, on the issue of whether cigarettes were merchantable under section 2-314 of the U.C.C. *Id.* at 1312.

¹⁷⁸ 114 F. Supp. 2d 797 (N.D. Iowa 2000).

¹⁷⁹ *Id.* at 828. The *Wright* court held:

Mr. Wright's breach of an implied warranty claim survives to the extent that it is based on specific allegations that defendants knowingly designed, manufactured [sic] and distributed a product which they knew was both carcinogenic and addictive and, thus, not fit for the ordinary purpose for which it was intended. Additionally, plaintiffs' allegation that the manipulative enhancement of the nicotine level in tobacco in order to induce addiction could possibly prove that the product was defective and, thus, not fit for the ordinary purpose for which it was intended.

Id. (citations omitted).

¹⁸⁰ For cases following the reasoning of *Wright*, see *Kotler v. Am. Tobacco Co.*, 926 F.2d 1217, 1225 (1st Cir. 1990); *Johnson v. Brown & Williamson Tobacco Co.*, 122 F. Supp. 2d 194, 207 (D. Mass. 2000); *Magnus v. Fortune Brands, Inc.*, 41 F. Supp. 2d 217, 224 (E.D.N.Y. 1999); *Smith v. Brown & Williamson Tobacco Corp.*, No. 96-0459-CV-W-3, 1999 U.S. Dist. LEXIS 21990, at *28 (W.D. Mo. Jan. 29, 1999); *Castano v. Am. Tobacco Co.*, 870 F. Supp.

As this note indicates in earlier sections, the way that the public views the current round of tobacco litigation has been altered profoundly through the public disclosure of documents that reveal the tobacco companies' alleged deceptive practices of manipulating nicotine levels to induce addiction.¹⁸¹ This new wrinkle, which includes a general re-evaluation of what the public has known concerning smoking in the context of nicotine addiction, manifests itself in how some courts define merchantability. In *American Tobacco Co., Inc. v. Grinnell*,¹⁸² the Supreme Court of Texas outlined the issue in basic form. In determining whether an implied warranty exists with respect to the harmful effects of smoking, the court found that no warranty claim exists when a plaintiff merely alleges that cigarettes are harmful because the common, public knowledge about the general ill-effects of smoking negates the existence of the warranty.¹⁸³ Thus, the court found that a claim alleging that cigarettes were defective because they had a negative impact on health was insufficient. However, the court noted that the dangers of nicotine addiction did not properly fit within the concept of common knowledge as it relates to the general health effects of smoking.¹⁸⁴ In this way, the Supreme Court of Texas acknowledged that the manipulation of nicotine levels and the resulting addiction are new cigarette defects that were previously unavailable to plaintiffs but now state sufficient claims for the breach of the implied warranty of merchantability.¹⁸⁵

The line, not surprisingly, is therefore drawn between those courts that see the ill-effects of smoking as a defect and those that do not. Twenty years ago, it would have seemed only a matter of time before courts found themselves in a position with plaintiffs who could not possibly claim that they did not know smoking was dangerous. Times have changed. The public in general, and courts in particular, seem more likely to listen to plaintiffs who articulate their position

1425, 1434 (E.D. La. 1994); *Kyte v. Philip Morris, Inc.*, 556 N.E.2d 1025, 1029-30 (Mass. 1990); and *Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 435 (Tex. 1997).

¹⁸¹ See *supra* Part III.C.2.

¹⁸² 951 S.W.2d 420 (Tex. 1997).

¹⁸³ *Id.* at 435 (refusing to recognize a claim for the implied warranty of merchantability when the public's common knowledge of the *general* risks of smoking show no expectation that cigarettes are safe).

¹⁸⁴ *Id.*

¹⁸⁵ Other courts note this difference as well. See *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 603 (7th Cir. 2000) ("There is a considerable difference between knowing that smoking is bad and knowing that smoking is addictive . . ."); *Wright v. Brooke Group Ltd.*, 114 F. Supp. 2d 797, 810-17 (N.D. Iowa 2000) (noting only common public knowledge exists of a general link between health and smoking and refusing to take judicial notice that specific risks, such as addiction, were not publicly known at the time plaintiff began smoking); see also DEP'T OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION, A REPORT OF THE SURGEON GENERAL* (1988) (providing the Surgeon General's first report on nicotine and addiction, almost twenty-five years after the first report describing the health effects of smoking in 1964).

with respect to the specific nature of their cigarette-related injury.¹⁸⁶ Alleging a blanket claim that only invokes the general health risk of smoking is a risky approach for plaintiffs claiming a breach of the implied warranty of merchantability. Offering the specifics of the claim, especially with respect to the addictive nature and resulting harm from that addiction, will likely garner more positive treatment for plaintiffs by the courts.

C. Current Issues on Defenses

1. Assumption of Risk

Official Comment 13 to section 2-314 of the U.C.C. states that it is necessary to show "that the breach of the warranty was the proximate cause of the loss sustained."¹⁸⁷ Since warranty law draws its origins from both tort and contract law, the concept of proximate cause will be borrowed from a jurisdiction's tort law to determine if a breach of warranty has proximately caused injuries to plaintiffs.¹⁸⁸ Thus, if plaintiffs have knowingly encountered the dangers resulting

¹⁸⁶ *S.F. Jury Tightens Noose on Big Tobacco*, S.F. CHRON., Feb. 12, 1999, at A24 (reporting a \$50 million jury award against Philip Morris and quoting the jury foreman as saying "[t]his jury as a whole was very angry at the cigarette companies."); David Stout, *Justice Dept. Plans Tobacco Suit Seeking Billions in Health Costs*, N.Y. TIMES, Sept. 22, 1999, at A1 (noting that the tobacco industry's image has suffered tremendously, especially in the wake of tobacco executives testifying under oath that there was no link between smoking and ill-health). In 1994, several tobacco executives testified before a Congressional subcommittee concerning smoking and health. Dubbed the "Waxman Hearings," the executives proceeded to deny any affirmative link between smoking and health and expressed no belief that nicotine is addictive. *Regulation of Tobacco Products: Hearings Before the House Comm. On Energy and Commerce, Subcommittee on Health and the Environment*, 103rd Cong. 542-628, 640-767, 791-844 (1994) (reporting testimony of tobacco industry leaders concerning nicotine and addiction). *But see*, THE GALLUP POLL: PUBLIC OPINION 1999 277 (George Gallup, Jr. ed., 2000) This Gallup Poll found somewhat mixed feelings about the plight of smokers among those polled. Fifty-five percent believed that smokers were mostly to blame for their problem, but 30% believed the cigarette companies were mostly to blame (an increase of 5% from 1994) and 13% felt smokers and the tobacco industry shared the blame equally. *Id.* In terms of the Federal Government's lawsuit against the tobacco industry, 51% supported the action while 42% opposed. *Id.*

¹⁸⁷ *See* CRANDALL ET AL., *supra* note 36, § 7.9, at 7.64 ("As is true in the law generally, only if the breach of warranty is a proximate cause of a compensable injury will the buyer have a cause of action against the seller. This is primarily an issue of consequential damages [such as smoking-related illness].") (footnote omitted).

¹⁸⁸ E.L. Kellett, Annotation, *Contributory Negligence or Assumption of Risk as Defense to Action for Personal Injury, Death, or Property Damage Resulting From Alleged Breach of Implied Warranty*, 4 A.L.R. 3d 501, 502 (1965) ("Actions for alleged breach of implied warranty are often held to be part of the law of contracts. However, such actions were formerly regarded as sounding in tort, and they retain certain aspects of the law of torts."); *see also* Flippo v. Mode O'Day Frock Shops of Hollywood, 449 S.W.2d 692, 693-94 (Ark. 1970)

from an alleged breach of implied warranty, then the breach has not proximately caused their injuries.¹⁸⁹

A thorough analysis of the assumption of risk defense, as it specifically relates to U.C.C. section 2-314, is curiously absent from the reported tobacco cases. *Grinnell*¹⁹⁰ comes close in its analysis of the public's common knowledge of smoking dangers, but then reasons that such knowledge lends itself to negating the mere existence of an implied warranty.¹⁹¹ The assumption of risk defense does not aim to negate the existence—or even refute an alleged breach—of an implied warranty, but only seeks to show that buyers are actually the proximate cause of their injuries because they used the product despite knowing its dangers.

Although the tobacco case law is somewhat bare on the subject, the most logical indicator of potential success for the assumption of risk defense is the extent to which a particular court, and possibly a jury, pays heed to the “common

(finding that a pair of trousers could not have proximately caused plaintiffs injury because a brown recluse spider was hiding in them); Jacqueline S. Bollas, Note, *Use of the Comparative Negligence Doctrine in Warranty Actions*, 45 OHIO ST. L.J. 763, 771–75 (1984) (describing the evolution of comparative negligence and proximate cause issues as they relate to warranty actions).

¹⁸⁹ See *Monsanto Co. v. Logisticon, Inc.*, 763 S.W.2d 371, 374 (Mo. Ct. App. 1989) (using the tort concept of assumption of risk in order to determine if damages proximately caused by a breach of warranty are recoverable under U.C.C. section 2-715). “[D]amages which have been caused by the continued use of a defective article, after the buyer has become aware that it does not conform to warranty, are not recoverable in an action or a counterclaim based on breach of warranty.” *Id.* (footnote omitted); *Gillespie v. Am. Motors Corp.*, 317 S.E.2d 32, 33 (N.C. Ct. App. 1984) (finding that the plaintiff assumed the risk of injury and could not maintain a claim for breach of warranty after he continued to drive a car for three years with knowledge that the car emitted noxious fumes in the passenger area); see also *Upjohn Co. v. Rachelle Labs., Inc.*, 661 F.2d 1105, 1108–09 (6th Cir. 1981). *Upjohn* applies Michigan law and analyzes the effect of the plaintiffs’ behavior on their ability to recover for a breach of the implied warranty of merchantability under section 2-314 of the U.C.C. The *Upjohn* court states:

Thus, considering the facts in the case at bar we think it no more than an exercise in semantics to quibble over whether the actions of the appellants amounted to an abandonment of their reliance on the seller’s implied warranty. . . . The important factor under either theory or an amalgam of them is that . . . the breach is no longer considered ‘the proximate cause of the loss.’ U.C.C. § 2-314, Comment 13. That is, the defect . . . of which the plaintiffs had knowledge, could no longer be relied upon by them as a basis for an action of breach of warranty.

Id. at 1109 (quoting *Murphy v. Eaton, Yale & Towne, Inc.*, 444 F.2d 317, 327 (6th Cir. 1971)).

¹⁹⁰ *Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997).

¹⁹¹ *Id.* at 435 (citing Official Comment 1 to section 2.313 of the Texas Business and Commerce Code (corresponding to U.C.C. section 2-313), which explains that implied warranties “rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated.”).

knowledge" doctrine. The common knowledge doctrine is a concept by which defendants seek to convince courts that cigarettes are not defective because the public perception of smoking is such that ill health is associated with cigarettes and therefore that no defect exists.¹⁹² This doctrine receives its most thorough treatment as it relates to plaintiffs' claims based on strict products liability in tort.¹⁹³ If courts believe that it is common knowledge that smoking is dangerous as it relates to the product liability theory, it is only a short step for courts to find that plaintiffs have assumed the risks associated with smoking and thus cannot show any alleged breach of merchantability as a proximate cause of their injuries.

The issue, then, appears to revolve around whether the courts or juries will find that the health risks related to smoking are in fact common knowledge to the public at large. As to this question, there is no consensus in the law. Many judges simply evaluate the history of cigarettes in America and take judicial notice of common knowledge.¹⁹⁴ As a matter of law, this result generally bars plaintiffs from claiming that cigarettes are in some way defective because of their damaging effect on health. Other courts, however, evaluate the history of tobacco and soundly refuse to take such judicial notice of the common knowledge doctrine as it relates to cigarettes.¹⁹⁵

¹⁹² *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 269-75 (D.R.I. 2000) (providing a thorough evaluation of the common knowledge doctrine as it relates to smoking and strict products liability).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 274 ("This Court is satisfied that, after the extensive publicity surrounding the 1964 Advisory Committee Report's unequivocal conclusion that smoking causes cancer, all reasonable consumers should be charged with this knowledge."); *see also* *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996) ("Like the dangers of alcohol consumption, the dangers of cigarette smoking have long been known to the community."); *Johnson v. Brown & Williamson Tobacco Corp.*, 122 F. Supp. 2d 194, 204 (D. Mass. 2000) ("[T]his Court is firmly convinced that the risks of smoking were quite clear to the population at large before 1969 . . ."); *Perez v. Brown & Williamson Tobacco Corp.*, No. C-97-070, 1997 U.S. Dist. LEXIS 7346, at *10 (S.D. Tex. Mar. 18, 1997) ("[T]his Court concludes that cigarettes are inherently unsafe and are known to be unsafe by ordinary consumers with the ordinary knowledge common to the community.").

¹⁹⁵ *See Hill v. R.J. Reynolds Tobacco Co.*, 44 F. Supp. 2d 837 (W.D. Ky. 1999), which observed:

Before the Court could apply the common knowledge doctrine as a defense to failure to warn and dismiss Hill's claim, it would need to take judicial notice of the public's past understanding of the risks of smoking. . . . [T]he judicial notice inquiry would focus on the state of popular consciousness concerning cigarettes before 1969. The Court is simply unwilling to take judicial notice of something as intangible as public knowledge over three decades in the past. The exercise seems inherently speculative and an inappropriate topic for judicial notice.

Id. at 844 (citation omitted); *see also* *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1526 (D. Kan. 1995) (refusing to take judicial notice of the common knowledge of smoking risks).

The distinction between the common knowledge of the general health effects of smoking, as opposed to the public's knowledge of nicotine, also plays a major role in the contemporary tobacco cases.¹⁹⁶ Many courts recognize a distinct difference between common knowledge as it relates to the general risks of smoking and common knowledge as it relates to nicotine addiction. Of the courts that have made the distinction, most find that the dangers of nicotine addiction are not common knowledge and therefore refuse to take judicial notice of this disputed fact.¹⁹⁷ The ultimate effect of this approach is that plaintiffs are able to

The Sixth Circuit Court of Appeals has beaten its own path in analyzing the common knowledge doctrine. In *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988), the court found that it was common public knowledge from 1974–1984 that smoking resulted in ill health and affirmed the defendant's victory in the district court. *Id.* at 236. The court limited its analysis to this time period because the Tennessee rule of repose prevented the plaintiff from bringing a claim more than ten years after the initial sale of cigarettes. *See also supra* note 124 and accompanying text.

Twelve years later, the Sixth Circuit again examined the common knowledge doctrine as it related to a smoker who claimed to have started smoking in 1950. *Tompkin v. Am. Brands*, 219 F.3d 566, 567–72 (6th Cir. 2000). Applying Ohio law, the court was able to examine the issue of common knowledge as it related to the time period prior to that examined in *Roysdon*. Here, the court made a crucial distinction between common knowledge of general health risks, and common knowledge of the specific disease of lung cancer. *Id.* at 572. While the court did not overrule its decision in *Roysdon*, it did distinguish the cases and added a new level of analysis concerning the common knowledge doctrine. Apparently, it was no longer enough to question the general knowledge of smoking and health, but rather the specific level of the public's knowledge as it related to the plaintiff's disease.

Shortly after *Tompkin*, the Sixth Circuit further examined both cases and came to the conclusion that courts should evaluate the extent of common knowledge of smoking and health as it relates to the allegations stated in the plaintiff's complaint. *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 351 (6th Cir. 2000). In *Glassner*, the complaint failed to allege that cigarettes caused a specific injury, and only claimed that smoking was generally hazardous to one's health. Therefore, the court only examined the common knowledge as it related to smoking and the resulting *general* health risks and found that the plaintiff was barred from bringing her claim. *Id.*

¹⁹⁶ *See supra* notes 192–95 and accompanying text.

¹⁹⁷ *See Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990), which noted:

Defendants argue the "health risks" of smoking are well within the contemplation of the ordinary consumer possessing ordinary knowledge common to the community as to the characteristics of cigarettes and that the "habituating propensities of smoking have long been common knowledge." However, Yvonne [Rogers] draws a distinction between the addictive, as opposed to habituating, qualities of cigarettes. There is no basis for our judicially noticing what the ordinary consumer's knowledge concerning the addictive qualities of cigarettes may have been when Richard began smoking in 1940. The state of knowledge attributable to the community of individuals consuming cigarettes has changed over time and will continue to do so. It was not until 1988 that the Surgeon General published a report informing of the addictive nature of cigarettes.

survive a judgment on the pleadings to the extent that defendants assert the common knowledge doctrine as a defense.¹⁹⁸

Whatever formulation a court gives to the common knowledge doctrine, the fact remains that there is no consensus among the courts as to whether there is any assumed public knowledge relating to the danger of smoking. Some take judicial notice that the risks of smoking are common knowledge; others refuse and hold that it is an issue of fact for a jury to decide. The logical conclusion remains, however, that a jurisdiction that commonly imputes knowledge of smoking's dangers to injured plaintiffs will likely find that they have assumed the risk of using tobacco. Therefore, their contributory behavior, as opposed to a breach of the implied warranty of merchantability, will likely be the proximate cause of their injury.

Another approach to dealing with assumption of risk lies in state statutory law dealing with comparative negligence. Regarding OPLA and its

Id. at 1054 (citation omitted); *Wright v. Brooke Group Ltd.*, 114 F. Supp. 2d 797, 816–17 (N.D. Iowa 2000) (reviewing other case law concerning common knowledge and judicial notice). The *Wright* court concluded that:

the court will refrain from taking judicial notice that the risks of cigarette smoking have been common knowledge to consumers since Mr. Wright began smoking in 1954. . . . [T]his court will likewise refrain from taking judicial notice that the risk of addiction has been common knowledge to consumers since Mr. Wright began smoking in 1954.

Id. In *American Tobacco v. Grinnell*, 951 S.W.2d 420 (Tex. 1997), the court stated:

Thus, to the extent we hold that the general health risks of smoking were within the knowledge common to the community[,] . . . American has established that its cigarettes were not unreasonably dangerous. . . . However, we also hold that American [Tobacco] did not establish as a matter of law that the specific danger of addiction from smoking was knowledge common to the community.

Id. at 432.

¹⁹⁸ Defendants have not abandoned the common knowledge doctrine merely because plaintiffs have been successful in convincing some courts that the dangers of nicotine addiction are not widely known. Rather, tobacco companies seek to condense the risks of nicotine addiction into the broad knowledge of the ill-effects of smoking in general. This results in an argument claiming that nicotine addiction is merely a “lesser included” risk associated with smoking and should not be considered a significant new hazard requiring its own analysis under the common knowledge doctrine. So far, this analysis has met with mixed results. *See Wright*, 114 F. Supp. 2d at 815 (citation omitted) (“[T]his court concludes that there is a considerable difference between knowing that smoking is bad and knowing that smoking is addictive. Therefore, this court rejects defendants’ argument, and concludes that the risk of addiction is not, as defendants assert, ‘a lesser included risk,’ of the risks of smoking.”). *But see Hollar v. Philip Morris, Inc.*, 43 F. Supp. 2d 794 (N.D. Ohio 1998) (“While more information may be available about Defendants’ allegedly ‘intentional manipulation’ of nicotine levels and their campaign to resurrect a ‘smoking controversy’ that information does not negate the public’s long held knowledge that cigarettes are (and were) dangerous to health.”).

interpretations,¹⁹⁹ the General Assembly has a specific statute²⁰⁰ dealing with comparative negligence in products liability actions.²⁰¹ In Ohio, assumption of risk, either express or implied, serves as a complete bar to recovery of damages in a products liability action.²⁰² Since implied warranty claims in Ohio are covered by the OPLA, tobacco defendants have no reason to ignore this statutory risk defense.²⁰³

¹⁹⁹ See *supra* notes 161–70 and accompanying text.

²⁰⁰ OHIO REV. CODE ANN. § 2315.20 (Anderson 2001). This provision states in part:

(B)(1) Express or implied assumption of the risk may be asserted as an affirmative defense to a product liability claim under [the OPLA]. . . .

(2) [I]f express or implied assumption of the risk is asserted as an affirmative defense to a product liability claim under [the OPLA] and if it is determined that the claimant expressly or impliedly assumed a risk and that such express or implied assumption of the risk was a direct and proximate cause of harm for which the claimant seeks to recover damages, the express or implied assumption of the risk is a complete bar to the recovery of those damages.

Id. The Ohio General Assembly amended the original 1988 version of this statute in 1997 with House Bill 350. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1097–102 (Ohio 1999), the Ohio Supreme Court found that House Bill 350 violated the one-subject rule of section 15(D) of Article II of the Ohio Constitution and thus declared the entire House Bill unconstitutional. However, House Bill 350 did not amend the provisions relating to the above quoted sections. Thus, the 1988 version of the comparative negligence provision, section 2315.20 of the Ohio Revised Code provides for the same result as the 1997 version.

²⁰¹ The reader should again recall that any claim for personal injury resulting from a breach of the implied warranty of merchantability is a “product liability claim” and must be brought under the OPLA. See *supra* note 162 and accompanying text.

²⁰² OHIO REV. CODE ANN. § 2315.20(B)(2) (Anderson 2001). Much of the case law relating to this provision is decided in the context of employees injured in the workplace by defective equipment. This analysis is not directly analogous to the tobacco cases because injured employees who are required to encounter defective products must balance their economic need to earn wages with the risk associated with using a defective machine. In this way, assuming the risk of injury may not be said to be voluntary. See *Carrel v. Allied Products Corp.*, 677 N.E.2d 795, 801 (Ohio 1997) (acknowledging generally the defense of assumption of risk in products liability cases, but holding that assumption of risk is only available if the employee encountered the defective product as part of his or her required duties).

On the other hand, one would argue that smoking is completely voluntary and thus not analogous to the employment context, but it is unclear how this argument would change if plaintiffs assert the addictive nature of nicotine. In this way, plaintiffs could conceivably convince courts that they had not assumed the risk of prolonged effects of smoking because the physiological effect of addiction made the assumption of risk involuntary.

²⁰³ The practitioner should be careful to note that some states, like Texas, do not have analogous assumption of risk statutes that relate specifically to products liability actions. See *supra* notes 158–60 and accompanying text. A close reading of the Texas statute, however, will reveal a result similar to an assumption of risk defense—the plaintiff must allege and prove that the dangers of the product were not commonly known to the public at large.

2. Lack of Notice

Although buyers are required to notify sellers of a breach of warranty within a reasonable amount of time,²⁰⁴ the courts that have addressed this issue in detail as it relates to tobacco litigation have ruled that the U.C.C. notice provision is a nullity. In *Wright*, the court reasoned that the notice provision of U.C.C. section 2-607(3)(a) only requires buyers to give notice to "sellers" and tobacco manufacturers are not sellers as defined by section 2-103(1)(d).²⁰⁵ Because the tobacco manufacturers do not sell cigarettes to the plaintiffs, they are not entitled to notice of the breach of warranty.²⁰⁶ The court concluded its ruling by stating both that notice would serve no purpose in the case at bar and that the defendants failed to identify how they would be prejudiced through a failure of being notified about the breach of warranty. Therefore, no notice was required.²⁰⁷

In *Witherspoon v. Philip Morris, Inc.*,²⁰⁸ the tobacco defendants sought to dismiss the plaintiff's breach of warranty claims for lack of notice of breach of warranty.²⁰⁹ Despite the fact that the plaintiffs apparently did not assert that they had provided actual notice, the court found that tobacco manufacturers, like asbestos manufacturers, were generally on constructive notice as to problems with their products.²¹⁰ The district judge reasoned that the numerous health inquiries and lawsuits seeking to find liability in the tobacco industry were sufficient to provide constructive notice and thus prevent U.C.C. section 2-607(a)(3) from barring the plaintiff's claims.²¹¹ Furthermore, the court borrowed a theory from tort law and declared that notice is not required when a manufacturer willingly fails to disclose a defect in a product,²¹² despite that section 2-607 fails to provide the plaintiff with such an excuse for not providing notice.²¹³ The court then

²⁰⁴ See *supra* Part II.B.

²⁰⁵ *Wright v. Brooke Group Ltd.*, 114 F. Supp. 2d 797, 830 (N.D. Iowa 2000).

²⁰⁶ *Id.* (citing *McKnelley v. Sperry Corp.*, 642 F.2d 1101, 1107 (8th Cir. 1981), for the proposition that a manufacturer is not a seller and not entitled to notice under section 2-607(3)(a) of the U.C.C.).

²⁰⁷ *Id.* (noting further that "based on the defendants' thoroughly written and researched briefs, coupled with their strong oral arguments, it is clear to this court that the defendants were not prejudiced by the lack of notice of the alleged breach of warranty claims in this case").

²⁰⁸ 964 F. Supp. 455 (D.D.C. 1997).

²⁰⁹ *Id.* at 464-65.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* (citing *Wesley Theological Seminary of the United States Methodist Church v. United States Gypsum Co.*, No. 85-1606, 1988 WL 288978, at *5 (D.D.C. Jan. 5, 1988)).

²¹³ A complete analysis of *Wright* and *Witherspoon* would be lacking without a statement about the inadequate reasoning applied by the courts in concluding that the notice requirement simply should not apply to tobacco plaintiffs. In *Wright*, the court oddly invoked the ghost of privity of contract in finding that notice must only be given by a seller, and the tobacco

refused to dismiss the warranty claims for lack of notice. The result of cases like *Wright* and *Witherspoon* indicates a tendency for courts to protect plaintiffs in terms of fulfilling the condition of notice.²¹⁴

defendants were not sellers since they did not directly sell the cigarettes to the smoker. If the court adopts this restrictive meaning of the word "seller," then it must also use the same meaning in analyzing the warranty claims alleged by the plaintiffs. The warranty provisions of the U.C.C. are all couched in terms of warranties made by "sellers" to buyers. Therefore, the tobacco manufacturers, who are not sellers according to the *Wright* court, could not have made any implied warranties to the plaintiffs, and any discussion of notice is irrelevant. Furthermore, the court concluded that the defendants would not be prejudiced by a lack of notice. This ignores that a lack of timely notice would bar the plaintiffs from recovering under the U.C.C. It is hard to imagine how the defendants could be prejudiced more considering that the court must dismiss the plaintiffs claim if they cannot meet the notice requirement.

The reasoning of the *Witherspoon* court does not fare much better. For that court to make its argument as to whether there should be some form of constructive notice, it first had to conclude both that the defendants willfully failed to disclose a defect in cigarettes and that the general public inquiries about health and cigarettes amounted to notice that cigarettes were in breach of the implied warranty of merchantability. These two issues, however, are hotly contested in today's litigation, and it makes little sense to draw such conclusions at an early stage. The reasoning appears to be an attempt to stretch greatly the meaning of notice in order to protect tobacco plaintiffs. On the other hand, if courts choose to enforce the notice requirement strictly, another seemingly unfair result occurs—plaintiffs with otherwise meritorious claims are thrown out on what some may term a "legal technicality" that serves no purpose in the tobacco context.

The answer to this conundrum, as usual, lies somewhere between the extremes. If courts were to examine the requirement of notice and accept the conclusion that filing a complaint fulfills the requirement in certain cases, such as tobacco litigation, plaintiffs would likely still be protected while using a less creative interpretation of the notice requirement. Professor Harry Prince best explains this conclusion first by examining what specific purposes notice serves in warranty litigation. Harry G. Prince, *Overprotecting the Consumer, Section 2-607(3)(a) Notice of Breach in Nonprivity Contexts*, 66 N.C. L. REV. 107 (1987). Notice serves the following purposes: to prevent stale claims, to allow the parties to negotiate a settlement before litigation, and to allow a seller opportunity to correct the problems experienced by the buyer. *Id.* at 115–16. Professor Prince further concludes that a complaint should constitute notice if, among other reasons, it actually fulfills the specific purposes of notice. *Id.* at 131. In other words, filing a lawsuit often provides great motivation for curing and settling warranty problems that may otherwise be left unresolved. Professor Prince also examines the statutory language and official comment to find that the complaint-as-notice concept fits well within the overall U.C.C. scheme. *Id.* at 128–32.

Taking this reasoning one step further, prior notice in a tobacco suit would serve none of the purposes outlined by Professor Prince. Tobacco manufacturers certainly cannot cure the problems created by cigarettes and, even today, it is inconceivable that they will settle an individual claim short of summary judgment, if ever. In this way, Professor Prince's argument is even more compelling. Allowing plaintiffs the opportunity to fulfill the notice requirement with their complaint is a better solution than the reasoning used by the *Wright* and *Witherspoon* courts and preserves any benefit for defendants when notice serves a viable purpose.

²¹⁴ Plaintiffs, however, should be cautioned that not all courts will be so protective. In *Watkins v. R.J. Reynolds Tobacco Co.*, Civil Action No. 90-130, 1998 U.S. Dist. LEXIS 23328,

V. A NEW COURSE FOR THE IMPLIED WARRANTY OF MERCHANTABILITY

What does U.C.C. section 2-314 and its current application to cigarettes mean?²¹⁵ Are the courts on the right track, or is change in order? What are the

at *6 (E.D. Ky. Oct. 14, 1998), the district court dismissed a plaintiff's claim for a breach of implied warranty of merchantability because the plaintiff did not allege a defect of cigarettes and further noted that notice must be given to the manufacturer within a reasonable time. It is important to note, however, that it is much easier to fault the plaintiff with lack of notice when other grounds for dismissal—like failing to properly allege a defect—exist.

²¹⁵ Before moving on to a contemporary, simplified definition of "merchantability," we must address a nagging issue that is apparent in numerous opinions dealing with the implied warranty of merchantability—namely whether courts should interpret the implied warranty of merchantability by importing concepts of tort law, contract law, or some other body of law. A diligent researcher could begin the day reading cases specifically interpreting section 2-314 of the U.C.C. strictly as a matter of contract law. *Spain v. Brown & Williamson Tobacco Corp.*, 230 F.3d 1300, 1310 (11th Cir. 2000) (quoting *Shell v. Union Oil Co.*, 489 So. 2d 569, 571 (Ala. 1986)) ("[S]uch an argument [that cigarettes are unmerchantable] ignores the clear distinction between causes of action arising under tort law and those arising under the [Uniform Commercial Code] as adopted in Alabama."). By midday, the practitioner would be well into cases that struggle with the basic concept of the implied warranty of merchantability and have difficulty concluding whether it is a common law tort action or one under the U.C.C. *Tompin v. Am. Brands*, 219 F.3d 566, 576 (6th Cir. 2000) (concluding that Ohio law still recognizes a common law tort of breach of implied warranty). At the end of the day, one will find cases that only mention the implied warranty of merchantability as a synonym for Restatement section 402A. *Back v. Wickes Corp.*, 378 N.E.2d 964, 969 (Mass. 1978). In *Back*, the court noted:

The Legislature has made the Massachusetts law of warranty congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965). For this reason, we find the strict liability cases of other jurisdictions to be a useful supplement to our own warranty case law.

Id. (citation omitted). Thus anyone researching the implied warranty of merchantability—U.C.C. section 2-314 or otherwise—must piece together concepts from all areas of law in order to grasp the idea.

Whatever the reasons for amalgamating various tort and contract law theories into the implied warranty of merchantability, the time has come to discontinue the practice. Complaints should state clearly whether plaintiffs allege a breach of U.C.C. section 2-314 or a claim under products liability law. Courts can then apply the appropriate analysis. The questions concerning U.C.C. claims are relatively simple: was there proper notice?; are there any disclaimers?; how have courts interpreted the privity requirements of the U.C.C.?; and so forth. If the claim is based on products liability, then the courts evaluate the issues as they relate to the relevant state law dealing with products liability, whether it be Restatement section 402A or other law. By failing to make this distinction, courts essentially place defendants, plaintiffs, and the courts themselves in legal limbo as to the subject of the particular lawsuit. If pleadings are designed to provide parties with notice, then failing to provide a clear understanding of how courts will handle breach of implied warranty claims guarantees the pleadings will fail in their purpose. Defendants will be at a loss to identify their responsibilities in pleading affirmative defenses such as lack of notice and the statute of limitations if they cannot determine how a court will handle the warranty claim until after a judgment on the pleadings. Moreover, providing a clear

future implications of the current jurisprudence? Are cigarettes really merchantable? Many courts analyze the meaning of merchantability and whether goods are "fit for the ordinary purpose," but few provide a helpful definition of merchantability for future application. The following discussion concludes that courts have developed an improper definition of merchantability in the tobacco cases. A more basic, fundamental approach is preferred and further explored below.

A. A New Approach: *The Functional Purpose Test*

Whether goods are merchantable under U.C.C. section 2-314 deserves a basic analysis centered on the simple functional purpose fulfilled by the goods. The term "functional" implies only a limited analysis of the basic ostensible purpose of the goods. Does an automobile provide basic transportation? Does the

distinction between U.C.C. warranty actions and other products liability actions simply makes the law easier to understand for litigants. For these reasons, it is time for courts and litigants to be specific in their pursuit of claims under either the U.C.C. or Restatement section 402A.

As a final note, the difference between contract law and tort law deserves brief mention. Whether warranty belongs in the realm of contract or the realm of tort is a question that is as old as warranty theory itself. Some would likely say that warranty is neither contract nor tort. *See* Karl N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 712 (1936) ("Warranty is a civil obligation [as opposed to a contract or tort]."); William Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1126 (1960) (noting that the concept of products liability is "a freak hybrid born of the illicit intercourse of tort and contract"). Grant Gilmore actually considered the future of the Restatements and pondered what the third Restatement of Contracts would embody. GRANT GILMORE, *THE DEATH OF CONTRACT* 84 (Ronald K.L. Collins ed., 1995). Noting the "schizophrenic" nature of the first Restatement of Contracts, Gilmore speculated that the walls between contract and tort law may further crumble by the time the world sees the third Restatement. *Id.* at 67-68, 83-84. Although we have not seen the third Restatement of Contracts, it is eerie to think the RESTATEMENT (THIRD) OF TORTS: STRICT PRODUCTS LIABILITY essentially fulfills Gilmore's prophecy. Now we have a Restatement that describes a case that presumptively begins with a contract, and often ends under a rule of tort law in a strict products liability action.

It is beyond the scope of this note to revisit this legal battlefield and attempt to revolutionize our thinking about contract and tort law. It suffices to say that the implied warranty of merchantability is codified in the U.C.C. and the language of the section is relatively simple to understand, save for the true meaning of merchantability which we will come to later. Some would say that this is merely another way of saying that warranty claims belong in the realm of contract, but this is not necessarily so because the U.C.C. is not necessarily a body of pure contract law. With its loose concepts of privity and unlimited recovery for personal injury, the Code does not provide the kind of rigid scheme that some commentators viewed as essential to the basic theory of contract law. *See, e.g.,* GILMORE, *supra*, at 23, 48, 67-68 (noting the formal, structured approach to contract law advocated by Oliver Wendell Holmes and Samuel Williston). Therefore, courts should interpret and apply section 2-314 of the U.C.C. as it relates to the body of law that we call the Uniform Commercial Code, not Restatement section 402A. Viewed in this way, whether we call section 2-314 contract law or tort law has little meaning.

lawnmower cut grass? Does the washing machine clean clothes?²¹⁶ As to cigarettes, do they light and burn properly such that they functionally produce common tobacco smoke? These are the very limited questions courts should address in determining the merchantability of goods.

Simply analyzing the functional purpose of goods is not to say that goods causing personal injury could never be unmerchantable. Rather, recovery for personal injury still flows from a breach of the implied warranty of merchantability that proximately causes personal injuries. A defective tire that fails obviously has not fulfilled its ostensible function of providing traction and proper handling capabilities for an automobile. Therefore, any personal injury resulting from the defective tire and ensuing accident is recoverable. A cigarette, on the other hand, represents a different analysis. The cigarette's functional purpose is to light, burn, and deliver tobacco smoke to the user. If the smoker is injured by a malfunction in this process, such as an injury from a cigarette that does not burn properly, then that injury is compensable.²¹⁷ However, an extensive investigation hinging on the culpability of the tobacco manufacturers as to whether they sought to injure or addict consumers is an analysis that does not fit well under a current implied warranty of merchantability and is improper under the functional purpose analysis.

The above analysis raises two immediate concerns. First, the functional purpose approach results in a somewhat abrasive, oversimplified, and seemingly trite conclusion concerning the merchantability of cigarettes, especially in light of the serious health effects resulting from their use. The second concern is a simple question: why do we need a more basic approach to interpreting section 2-314 of the U.C.C., or alternatively, what is wrong with the way courts have interpreted merchantability in the past tobacco cases?

The response to the first concern implies the answer to the second question. That the functional purpose test is short in its analysis is precisely the reason that it is needed. The alternative to the narrow functional analysis test is the broad investigation into the history and subjective needs and purposes of the parties, which produces a merchantability analysis that is inappropriate and goes well beyond the basic promise that goods will work under section 2-314 of the U.C.C. To state the proposition another way, we need a new approach to interpreting section 2-314 because the analysis developed by courts in tobacco litigation is unacceptable.

²¹⁶ See 3 SAMUEL WILLISTON ET AL., *WILLISTON ON SALES* § 18-1, at 77 (5th ed. 1994) ("There is no expectation nor any implication made by law that there be absolute perfection in that product . . . however, it would be reasonable to expect that the washing machine will wash clothes.").

²¹⁷ See *De Lape v. Liggett & Myers Tobacco Co.*, 25 F. Supp. 1006 (S.D. Cal. 1939) (awarding damages to plaintiff for facial burns suffered when a cigarette produced a large flash flame).

The remainder of this note provides three reasons that the complicated interpretation of merchantability espoused by many courts in the tobacco cases is improper, and that a resort to a more basic interpretation is the viable alternative. Specifically, the following pages show how an expansive analysis of merchantability results in U.C.C. section 2-314 becoming a nullity in the shadow of Restatement section 402A. Furthermore, interpreting U.C.C. section 2-314 as a mere appendage to products liability law is likely contrary to the overall conceptual purpose of the Uniform Commercial Code. Finally, a broad interpretation of merchantability will result in a new era of mass tort litigation concerning "toxic food" that will further weaken and distort section 2-314 as an independent, viable legal theory.

B. The Need for a Narrow Interpretation of Merchantability

1. Avoiding a Nullity:

Giving Section 2-314 of the U.C.C. a Life Of Its Own

The expansive inquiry into a multi-faceted definition of merchantability, whereby courts evaluate the latent harmful effects of cigarettes and balance this information with concerns of nicotine addiction, deceit by the tobacco industry, and concerns about common knowledge, creates an analysis similar to that required under Restatement section 402A.²¹⁸ The result is that U.C.C. section 2-314 becomes synonymous or completely subsumed into the Restatement section 402A such that it loses its basic character as a simple promise that the seller's goods will work. The best way to understand the error in this approach is by evaluating an example.

In *Back v. Wickes Corp.*²¹⁹ the Supreme Judicial Court of Massachusetts concluded that the implied warranty of merchantability was the legal equivalent of Restatement section 402A and thus established a new frontier in warranty law.²²⁰ In a case involving the alleged defective design of a fuel tank on a motor-

²¹⁸ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

²¹⁹ 378 N.E.2d 964 (Mass. 1978).

²²⁰ *Id.* at 969. The Supreme Judicial Court of Massachusetts found that the Massachusetts legislature had (1) eliminated the privity requirement in warranty actions, MASS. GEN. LAWS ch. 106, § 2-318 (2000), (2) extended the applicability of warranty law to leases, and (3) prohibited the disclaimer of the implied warranty of merchantability in the context of consumer sales, MASS. GEN. LAWS ch. 106, § 2-316 (2000). After noting these facts, the court declared that the state legislature had

jettisoned many of the doctrinal encumbrances of the law of sales, and what remains is a very different theory of recovery from that traditionally associated with the sale of goods. The Legislature has made the Massachusetts law of warranty congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965).

Back, 378 N.E.2d at 969.

home that ignited after an accident, the court concluded that the Massachusetts legislature had intended section 2-314 of the U.C.C. to serve as the state's version of Restatement section 402A.²²¹ Because the Massachusetts legislature had eliminated the privity requirements and the defendant's ability to disclaim implied warranties, the court reasoned that lawmakers had intended to remove all vestiges of contract law associated with U.C.C. section 2-314, thereby creating a clone of Restatement section 402A.²²² Thus, the implied warranty of merchantability became Restatement section 402A and *vice versa*, and the court eventually required plaintiffs to establish either a design defect or a breach of duty to warn users about the risks of a particular product.²²³ Further cases went as far as to require plaintiffs to offer a safer design for the product in order to recover under U.C.C. section 2-314.²²⁴ All of this eventually made its way into the tobacco cases as the courts applied this unique formulation of section 2-314 to

A useful comparison to *Back* comes from Ohio. In *Temple v. Wean United, Inc.*, 364 N.E.2d 267 (Ohio 1977), the Supreme Court of Ohio also analyzed the implied warranty of merchantability in tort and concluded that:

there are virtually no distinctions between Ohio's "implied warranty in tort" theory and the Restatement[']s section 402A] version of strict liability in tort, and because the Restatement formulation, together with its numerous illustrative comments, greatly facilitates analysis in this area, we hereby approve Section 402A of the Restatement of Torts 2d.

Id. at 271 (citation omitted). This conclusion seems entirely proper because it deals with a common law warranty theory in tort and not with U.C.C. section 2-314. In this way, courts can and should combine all common law warranty theories with Restatement section 402A. However, any attempt to combine U.C.C. section 2-314 and Restatement section 402A would remove the implied warranty from its context as part of the Uniform Commercial Code and create even greater confusion in the application of U.C.C. section 2-314.

²²¹ *Back*, 378 N.E.2d at 969.

²²² *Id.*

²²³ *Hayes v. Ariens Co.*, 462 N.E.2d 273, 277 (Mass. 1984) ("[T]he finding that the warranty had not been breached signified that the product had not only been properly designed but also that adequate warning of dangers had been given."); *see also Kotler v. Am. Tobacco Co.*, 926 F.2d 1217, 1225 (1st Cir. 1990). The *Kotler* court held:

Thus, a breach of warranty can occur if either (1) the product is defectively designed, or (2) foreseeable users are not adequately warned of the dangers associated with its use. . . . [Furthermore,] [w]e are aware of no Massachusetts case in which liability attached in the absence of evidence that some different, arguably safer, alternative design was possible.

Id.

²²⁴ In *Johnson v. Brown & Williamson Tobacco Corp.*, 122 F. Supp. 2d 194, 207 (D. Mass. 2000), the court interpreted *Kotler* to require a tobacco plaintiff both to show that cigarettes were defectively designed and then to offer a safer alternative design in order to recover. Plaintiffs met this burden by showing, *inter alia*, that the defendant could have removed more carcinogens with better dilution and filtration. *Id.* at 202.

cigarettes,²²⁵ such that tobacco litigants are now often faced with the confusion and tension surrounding the implied warranty of merchantability and Restatement section 402A.

In the tobacco context, the result of this confusion is not a basic review and academic application of the U.C.C.'s implied warranty provision, but rather a protracted analysis of design defects, failures to warn, possibilities of safer designs, and other matters that typically lie in the field of strict products liability law. The confusing panoply of state warranty law casts courts adrift in exploring areas that seem to have little connection to a basic functional concept of merchantability. Considering both the numerous cases discussing section 2-314 of the U.C.C. and the full array of evaluations and analyses of tort law versus contract law, some courts have essentially abandoned the basic promise from the buyer to the seller that the goods will work.²²⁶ When courts evaluate section 2-314 in the same manner as the Supreme Judicial Court of Massachusetts, the basic promise of functional merchantability ceases to exist and section 2-314 becomes a nullity in the shadow of Restatement section 402A.

2. *The Conceptual Framework of the Uniform Commercial Code*

Because commercial law was always viewed as being hopelessly behind current business practices,²²⁷ the creators of the Uniform Commercial Code drafted the Code with the understanding that it should reflect commercial reality, as opposed to serving as a fabricated regulatory scheme for commercial law.²²⁸

²²⁵ See *Kotler*, 926 F.2d at 1225 (following *Back*'s formulation of section 2-314 of the U.C.C.); *Johnson*, 122 F. Supp. 2d at 207 (following *Kotler*); see also *supra* Part IV.B (dealing with varying concepts of merchantability). Other states have their own quirks with regard to the implied warranty of merchantability. For example, Illinois does not allow for recovery of noneconomic damages other than personal injury under U.C.C. section 2-314. Rather, plaintiffs are limited to tort law when trying to recover for noneconomic loss. See *Seegers Grain Co., Inc. v. United States Steel Corp.*, 577 N.E.2d 1364, 1371-72 (Ill. App. Ct. 1991). The Illinois courts follow this reasoning even in light of the fact that the Code tells us how to determine what damages are recoverable. Section 2-715(2)(b) allows recovery for personal injury resulting from goods, and section 2-715(2)(a) of the U.C.C. allows recovery for other damages that are foreseeable to the parties at the time of contracting. The question then becomes: why complicate the matter by delving into issues of economic and noneconomic damages when the issue is resolved by determining what damages the parties could foresee at the time of contracting?

²²⁶ See *supra* Part II. After reading the numerous cases on the implied warranty of merchantability, one can also conclude the term *Uniform Commercial Code* is a misnomer in warranty law.

²²⁷ Grant Gilmore, *On The Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1341 (1948) ("There is apparently wide agreement that the law of sales, in particular, is hopelessly behind the times.").

²²⁸ See *id.* ("The principal objects of draftsmen of general commercial legislation—by which I mean legislation which is designed to clarify the law about business transactions rather

Therefore, the desire was to reflect current trends.²²⁹ If this is the reality the Code serves, it follows that U.C.C. section 2-314 should not be subsumed into the Restatement section 402A to the extent that the implied warranty of merchantability becomes irrelevant. While the meaning of merchantability was arguably broad enough to include products liability concepts, it does not follow that the drafters foresaw the current evolution of Restatement section 402A that included a subsequent dismissal of U.C.C. section 2-314 as a separate legal theory. At the time of its drafting, consumer protections laws, including Restatement section 402A, were practically non-existent and, in any event, not nearly as developed as they are today. This is likely the reason that the definition of "merchantability" is so nebulous in the Code—it gave courts the opportunity to conduct broad factual inquiries and expansive analyses into whether goods were merchantable in order to protect consumers.²³⁰ Even so, other law, like Restatement section 402A and state consumer protection acts, evolved to protect those interests. In this light, section 2-314 should not be viewed from the time of its drafting in a post-World War II era with little consumer protection law, but rather in a contemporary era with well-developed statutes and case law that protect consumers in other ways. Therefore, U.C.C. section 2-314 can best reflect the current needs of commercial law if it is given a more fundamental interpretation.²³¹

than to change the habits of the business community—are to be accurate and not to be original."); *id.* at 1350 ("The draftsman of a commercial act is supposed to be the recorder of established usage . . .").

²²⁹ *Id.* at 1359 ("The theory of the proposed Commercial Code is that we must keep our statutes up to date.").

²³⁰ See generally *supra* note 23.

²³¹ Grant Gilmore, a prominent drafter of the Uniform Commercial Code, was a proponent of ensuring that statutes represented contemporary commercial needs. Although he realized that statutes could not be re-written at will to deal with every new situation, he did realize that judicial interpretation played an important role in maintaining the usefulness of the Code. "As statutes pass quietly out of date without disappearing from the books, the effect is to reintroduce a common law case system, which is perhaps peculiarly fitted to deal with the fluctuations and mutations of commercial life." Gilmore, *supra* note 227, at 1359. Thus, any court that seeks to maintain the relevance of U.C.C. section 2-314 and adopts a restricted meaning of "merchantability" could do so while maintaining the purpose and spirit of the Uniform Commercial Code. See also Daniel Gerson, *Disclaimer of Warranties and Product Liability*, in TECHNIQUES, PROCEDURES, AND PITFALLS UNDER THE UNIFORM COMMERCIAL CODE: PROCEEDINGS OF THE FIRST ANNUAL UNIFORM COMMERCIAL CODE INSTITUTE 27, 34 (1968) ("Essentially, the Code has relatively little to do with the subject of Product Liability. . . . The application of commercial doctrines to Products Liability situations is an awkward one.")

C. Fast Food and the Road Ahead

We take Joe Camel off the billboard because it is marketing bad products to our children, but Ronald McDonald is considered cute. How different are they in their impact, in what they're trying to get our kids to do?

Dr. Kelly Brownell, Yale Psychologist²³²

Mass tort litigation often results from frustration arising out of a failure to obtain legislative action controlling such unpopular institutions as the tobacco industry.²³³ These cases often involve the implied warranty of merchantability²³⁴ and seek to hold manufacturers liable for creating such social ills as gun violence²³⁵ and the potential dangers of alcohol.²³⁶ The courts that maintain a

²³² Bridget Murray, *Fast-Food Culture Serves Up Super-Size Americans*, 32 MONITOR ON PSYCHOLOGY 33, <http://www.apa.org/monitor/dec01/fastfood.html> (last visited Oct. 19, 2002) (quoting Dr. Brownell); see also Seale, *supra* note 6.

²³³ See generally Philip C. Patterson & Jennifer M. Philpott, Note, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK. L. REV. 549, 550 (2000) ("The Attorneys General who sued the tobacco industry acted out of frustration with the lack of political initiative to address the public health crisis . . ."); see also U.S. Newswire, *New Mexico Supreme Court Ruling a Victory for Gun Safety Litigation, Clears Way for Trial*, (Oct. 22, 2001), http://www.usnewswire.com/topnews/Current_Releases/1022-125.html (last visited Oct. 19, 2002) (describing a recent case where plaintiffs sought to hold the gun industry liable for its "irresponsible business practices that contribute[d] to the shameful level of gun violence in this country").

²³⁴ See *City of Boston v. Smith & Wesson*, No. 1999-02590, 2000 Mass. Super. LEXIS 352, at *69-73, 79 (Mass. Super. July 13, 2000) (refusing to dismiss, *inter alia*, gun manufacturer's motion to dismiss breach of implied warranty count for failure to state a claim); *Rhodes v. R.G. Indus., Inc.*, 325 S.E.2d 465, 468 (Ga. Ct. App. 1984) (finding that properly functioning firearms do not breach U.C.C. section 2-314).

²³⁵ See Debra Burke et al., *Women, Guns and the Uniform Commercial Code*, 33 WILLAMETTE L. REV. 219 (1997). One argument as to why guns are not merchantable relies on the common perception that guns are intended for self-defense. Burke concludes:

That guns can kill is obvious. However, it may not be obvious that guns are ineffective for self-defense unless the user is adequately trained in the proper way to use, store, handle, and care for the weapon. If a danger is not obvious, then the seller must warn the consumer or the implied warranty of merchantability will be breached.

Id. at 226; see also *id.* at 226 n.13 (noting several studies that show women who kill with guns rarely kill in self-defense).

Much of this line of reasoning relates the assumption of risk defense available to manufacturers facing breach of implied warranty claims. See *supra* Part IV.C.1. As Burke notes, "[t]hat guns kill is obvious." Burke et al., *supra*, at 227. This concession alone, regardless of whether consumers were warned about proper training or safety, should be sufficient to find that a plaintiff assumed the risk of firearm use and thus that no warranty was breached.

²³⁶ *Gawloski v. Miller Brewing Co.*, 644 N.E.2d 731, 732 (Ohio Ct. App. 1994) (seeking

complex definition of merchantability will likely preside over a variety of these suits in the future and will be forced to change either their interpretations of U.C.C. section 2-314 or find that a variety of these unpopular products are unmerchantable.

The most intriguing candidate for future litigation evolves from the attack on the fast food industry, consisting of all merchants who manufacture and produce foods high in fat, sugar, and calories.²³⁷ Admittedly, it seems a little far-fetched to believe that courts will put Ronald McDonald and the Hamburgler in the same category as Joe Camel and the Marlboro Man, but one's attitude changes dramatically upon even a cursory examination of the current attacks on the fast food industry.²³⁸

The similarities between cigarettes and fast food will undoubtedly be played out in a recent class action lawsuit filed in New York by Caesar Barber in July of 2002, claiming damages for illnesses related to the over-consumption of fast food.²³⁹ Barber's complaint, much like the tobacco suits, focuses on the

recovery for alcohol addiction based on the implied warranty of merchantability).

²³⁷ See Murray, *supra* note 232, at 33 (reporting Dr. Kelly Brownell's description of fast food industry as the "toxic food environment"—the strips of fast-food restaurants along America's roadways, the barrage of burger advertising on television and the rows of candies at the checkout counter of any given convenience store").

²³⁸ See Geraldine Sealey, *Whose Fault is Fat?: Experts Weigh Holding Food Companies Responsible for Obesity*, ABCNEWS.COM (Jan. 22, 2002), at <http://www.abcnews.go.com/sections/us/DailyNews/obesityblame020122.html> (last visited Oct. 19, 2002):

Although no one is taking such legal action against the food industry, nutrition and legal experts say it is reasonable to think that someday, it may come to that.

"There is a movement afoot to do something about the obesity problem, not just as a visual blight but to see it in terms of costs," says John Banzhaf, a George Washington University Law School professor.

....

[Although it will be difficult to challenge the fast food industry], some public health advocates still say corporations should—and will—ultimately bear some responsibility for the obesity epidemic.

"It will not be easy, but the public now sees the tobacco industry as having caused the epidemic of lung disease and cancer," said Tony Robbins, chair of family medicine and community health at Tufts University. "People need to be creative about this, but tobacco was no minor opponent, either."

Id.; see also Megan McArdle, *Can We Sue Our Own Fat Asses Off?*, SALON.COM (May 24, 2002), at <http://salon.com/tech/feature/2002/05/24/fastfoodlaw/print.html> (last visited Oct. 19, 2002).

²³⁹ Complaint, *Barber v. McDonald's Corp.*, No. 23145/2002 (N.Y. Sup. Ct. Bronx County filed July 24, 2002), <http://news.findlaw.com/hdocs/docs/mcdonalds/barbermcds72302cmp.pdf> (last visited Oct. 19, 2002) [hereinafter *Barber Complaint*]; see also *Obese Man Sues Fast Food Chains*, MSNBC.COM (July 26, 2002), at <http://www.msnbc.com/news/786102.asp> (last visited Oct. 19, 2002) ("Barber told MSNBC

following: the health effects of eating fast food, the enormous sums of public money spent to combat fast food-related illness, and the marketing efforts aimed at children. Barber's complaint also alleges reliance upon "the skill and judgments of Defendants . . . and [their] representations and warranties. . . ." ²⁴⁰

Distinguishing cigarettes from fast food seems simple at first because of two important concerns. First, fast food is not addictive like nicotine. Second, the fast food industry is not widely perceived as having preyed on unknowing consumers, thus lacking the diabolical reputation associated with cigarette manufacturers. Opponents of the fast food industry are slowly but steadily working to eliminate these concerns, and if they succeed, courts will have an extremely difficult time distinguishing their tobacco jurisprudence from the facts surrounding fast food liability. As to addiction, activists are beginning to argue that high-fat foods possess addictive characteristics that often result in eating disorders and the current obesity epidemic. ²⁴¹ Furthermore, others are beginning to vilify the fast food industry by employing a public information campaign that is identical to that used against cigarette manufacturers. Many believe that the tobacco industry intentionally sought to addict young consumers so as to ensure lifetime customers. Some are now saying the fast food industry is doing the same. The following paragraphs explore these assertions further.

1. Fast Food and Addiction

The common perception that food is not addictive is the first argument as to why fast food is easily distinguished from cigarettes, but recent research is

TV that he didn't realize fried food was bad for him until his doctor told him so three years ago.").

²⁴⁰ Barber Complaint, *supra* note 239.

²⁴¹ This note focuses on warranty law and not the politics of public nutrition and health. Indeed the problems caused by America's poor diet are probably getting worse and possess a global reach. See *Frontline: Fat* (PBS television broadcast, Feb. 14, 2002), transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/fat/etc/script.html> (last visited Oct. 19, 2002) (identifying the numerous societal problems caused by poor diets, including psychological impact such as eating disorders as well as the obvious physical health implications); see also ERIC SCHLOSSER, *FAST FOOD NATION* 241 (2001) ("Obesity is now second only to smoking as a cause of mortality in the United States.").

If any political message is adopted in this note, it only seeks to address the issue of how far the judicial system should stretch the meaning of warranty provisions contained in a commercial code that was conceived long before the public outrage over cigarettes, guns, and fast food. Along that line of reason, it is also appropriate to question the extent to which society should allow litigation to become a proxy for legislation. See Daniel Akst, *Challenging That Cheeseburger*, N.Y. TIMES, Nov. 7, 1999, at C4 ("The point is not the merits The point is, who decides? Despite the role of money in politics, government can regulate harmful products whenever there is the political will to do so."); see also Patterson & Philpott, *supra* note 233, at 550 (noting that plaintiffs, including public entities, often use litigation after failing in the legislative/political process).

changing those attitudes.²⁴² Thus, it is clearly conceivable that certain fast foods can be widely held to be addictive in the future; after all, tobacco has existed for centuries, but major concerns about addiction have only surfaced in the last twenty years.²⁴³ It thus seems clear that the trend is growing strongly in favor of characterizing fast food as addictive, enabling plaintiffs to analogize their U.C.C. section 2-314 claims to those of plaintiffs injured by cigarettes.

One counterargument to this line of reasoning is that, even though fast food may be addictive, it is not as severe as the addictive effect of nicotine. This may or may not be true, but analyzing merchantability from this perspective not only requires an inappropriate analysis of addiction by ignoring the basic functional purpose of cigarettes, but goes even further to inquire into varying degrees and types of addiction. Are we to say that nicotine addiction makes cigarettes unmerchantable, but fast food addiction is acceptable? How much scientific evidence is needed to distinguish the two? This is precisely the unnecessarily broad and expansive inquiry that the functional purpose test seeks to avoid. Without a narrow analysis, there is seemingly no end to the level of detail courts may pursue in trying to determine whether goods are merchantable.

²⁴² Although fast foods apparently lack an addictive element, eating habits learned during youth and the resulting eating disorders from unhealthy diets can potentially be analogized to the addictive nature of nicotine and thus the comparison between tobacco and fast foods would be complete. See *Frontline: Fat*, *supra* note 241; see also SCHLOSSER, *supra* note 241, at 123–29 (describing the irresistible lure of good-tasting food, enticing food texture, and the artificial flavor industry). Schlosser argues:

A taste for fat developed in childhood is difficult to lose as an adult [T]he major chains have apparently decided that it's much easier and much more profitable to increase the size and the fat content of their portions than to battle eating habits [with healthier food] largely formed by years of their own mass marketing.

Id. at 241. Another author has observed:

The craving for junk food has hooked 90% of Americans and played a significant role in widespread weight gain and the growing epidemic of obesity.

Whether the definition of addiction applies is still being debated, but the serious nature of an entire nation's feelings about food can no longer be described as likes or preferences. The combination of sensual foods in the modern world and a simplified definition of addictions as "pleasure-seeking behaviors" means that "delicious" and "addictive" may have no distinction

[F]ood abuse is linked to the same brain chemical imbalances noted with drug and alcohol abuse

LAURA PAWLAK, *STOP GAINING WEIGHT* 69–70 (2001).

²⁴³ See *THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION*, *supra* note 185.

2. Fast Food and Public Image

In terms of creating a negative public image that portrays the fast food industry as preying on unknowing Americans who believe they are receiving "merchantable" food, the strategies and tactics are identical to those used to attack cigarette manufactures.²⁴⁴ Like the tobacco saga, it all began with a public health scare about the risks involved with poor diets, particularly those high in fat. The demands for improved food labeling followed in order to inform consumers better, much like the 1965 and 1969 Acts.²⁴⁵ Furthermore, states currently tax the sale of cigarettes, and seventeen states currently tax the sale of certain fast foods, mostly those sold in vending machines.²⁴⁶ These comparisons begin to focus the picture, but the latest trends are so strikingly similar to those used against the tobacco industry that it seems likely that mass tort litigation will follow.

The most recent tactics focus on issues that eventually turned the tobacco industry into a public enemy and perpetuated its downfall and eventual settlement: many today are accusing the fast food industry of focusing their marketing on children²⁴⁷ and they are adducing statistics showing the enormous

²⁴⁴ See Akst, *supra* note 241 (asking if it is far-fetched to sue the fast food industry and finding that "[t]he same line of reasoning underlies the litigation that has succeeded so spectacularly against the tobacco companies; similar suits are pending against manufacturers of guns").

²⁴⁵ See Bruce Silverglade, *The Fight for Food Labeling Reform—An Insider's Perspective*, CSPINET.ORG (Jan. 1997), <http://www.cspinet.org/reports/flfight.html> (last visited Oct. 19, 2002) (providing a commentary by the Director of Legal Affairs for the Center for Science in the Public Interest).

²⁴⁶ See Press Release, Ctr. for Sci. in the Pub. Interest, *Tax Soda and Snacks to Promote Health: Measure Recommended in the American Journal of Public Health*, CSPINET.ORG (June 1, 2000), at <http://www.cspinet.org/reports/tax/index.html> (last visited Oct. 19, 2002). The article states:

Health Advocates at the Center for Science in the Public Interest (CSPI) and Yale University recommended in a paper in the June issue of the *American Journal of Public Health* that soft drinks and snack foods be taxed to provide funding for nutrition and health campaigns.

The new study found that 17 states . . . already have special taxes on soft drinks or snack foods.

Id. (referring to Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 6 AM. J. OF PUB. HEALTH 854 (2000), at <http://www.cspinet.org/reports/jacobson.pdf> (last visited Oct. 19, 2002).

²⁴⁷ See, e.g., Murray, *supra* note 232 (quoting Yale psychologist Dr. Kelly Brownell as stating, "We take Joe Camel off the billboard because it is marketing bad products to our children, but Ronald McDonald is considered cute. How different are they in their impact, in what they're trying to get kids to do?"); see also SCHLOSSER, *supra* note 241, at 42 (describing the growth of advertising to children); The Center for Science in the Public Interest, *Save Harry!*, at <http://www.saveharry.com> (last visited Oct. 19, 2002) (announcing a campaign to save the popular children's character Harry Potter from an association with Coca-Cola, a

sums of public money spent each year on health care related to complications from diets rich in fast foods.²⁴⁸ In terms of advertising to children, fast food manufacturers are particularly aggressive and often target Saturday mornings when many children watch television.²⁴⁹ Additionally, fast food opponents are also noting the large sums of money that are spent each year on obesity-related illnesses—one estimate places the total at \$117 billion annually.²⁵⁰ Without these last two characteristics, the fast food industry lacks the diabolical nature of the tobacco industry, but consumer activists are seeking to change the image. If the transformation is completed, then the pending litigation and conceivable success is merely academic.²⁵¹

vendor of “liquid candy” and a participant in a \$150 million deal with Warner Brothers to market Coca-Cola aggressively in connection with the Harry Potter character).

²⁴⁸ See Econ. Research Serv., U.S. Dept. of Agriculture, *Briefing Room: Diet and Health*, at <http://www.ers.usda.gov/briefing/DietAndHealth/> (last updated July 30, 2002) (“Just seven diet-related health conditions cost the United States \$80 billion annually in medical costs and productivity losses . . .”); see also Jim Barlow, *What Will Be the Next Category of Victim?*, HOUSTON CHRON., Nov. 25, 1997, at 1 (“The Florida [Medicaid Third-Party Liability Act of 1978] . . . says that if any individual is the ‘victim’ of a product manufacturer—not just cigarettes—and is also a Medicaid recipient, then the manufacturer can be sued for damages.”).

²⁴⁹ See Sealey, *supra* note 238, who states:

“Certainly, fast food has been marketed overtly to children and my guess is if you looked closely around the internal documents of the fast food industry and processed food industry it would shock me if they didn’t have very sophisticated studies about their consumers,” said Richard Nagareda, Vanderbilt University Law School professor. “Whether you can take that to the level of a successful lawsuit is not so clear.”

²⁵⁰ See Sealey, *supra* note 6, (“The U.S. surgeon general said in a report last December that obesity kills an estimated 300,000 Americans each year and costs \$117 billion in health-related costs.”); see also *Task Force on Tobacco Litigation*, *supra* note 2 (describing the issues related to state Medicaid subrogation suits).

²⁵¹ When speaking of success in mass tort litigation, which often includes U.C.C. section 2-314 in some manner, it is important to quantify and qualify the meaning of success. For defendants, the liability is obviously crippling and likely to result in higher consumer prices. One commentator argues:

Beer and liquor will be next, or coffee and cola, or the fast food industry. Lawsuits will be filed—supposedly on behalf of the taxpayers—but the taxpayers won’t get all the proceeds. What they will get is a hefty rise in the price of coffee, soda, hamburgers and goodness knows what else.

Amy Ridenour, *Minnesotans Say No to ‘Big Law’*, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, June 10, 1998, LEXIS, Allnews File. Plaintiffs, on the other hand, receive some compensation, but no one comes out further ahead than plaintiffs’ attorneys. *Id.* (“Nationally, under the Senate’s tobacco bill, Professor Lester Brickman of Yeshiva University’s Cardozo School of Law estimates that Big Law will take home about fifteen percent of approximately \$206 billion. That’s \$30.9 billion—a figure that exceeds the annual gross national product of a majority of the world’s nations.”); see also Amy Moritz Ridenour, *Greed Imperils Tobacco Settlement*, VENTURA COUNTY STAR, Sept. 14, 1997, at D05 (noting that plaintiff’s lawyers will receive

3. *The Implied Warranty Link: Tobacco and Fast Food*

Why is all this important to section 2-314 of the U.C.C.? The answer is simple—litigation against fast food producers, gun manufacturers, alcoholic beverage producers, and others is unavoidable if courts maintain their current merchantability jurisprudence as developed in the tobacco cases. The in-depth analysis of industry behavior, common knowledge of “hidden” dangers, failures to warn and a variety of other products liability concepts will enable plaintiffs to bring more causes of action against these industries. Courts will then be faced with the proposition of following their current tobacco jurisprudence and finding that most of these industries produce unmerchantable products, or they will be forced with the awkward and disfavored option of restructuring their jurisprudence—a result that they are arguably faced with now. Thus, courts should use the above analysis as a persuasive justification for adopting a more basic interpretation, like the functional purpose test, in order to prevent the constant ebb and flow of litigation against unpopular industries based on the alleged breach of U.C.C. section 2-314.

VI. CONCLUSION

The tobacco cases present courts with a golden opportunity to steer the future of U.C.C. section 2-314 in the right direction. As state supreme courts face certified questions dealing with the implied warranty of merchantability,²⁵² they have before them the ability to chart a new course and return section 2-314 to a more basic approach of providing a simple promise from the buyer to the seller that goods subject to the contract of sale will work. The expansive analyses of merchantability applied by courts today erode the basic concepts of

nearly \$3 billion alone from the \$11.3 billion settlement in Florida). While these are only preliminary estimates that could certainly change, they are not far-fetched by any means. Of all mass tort litigation, the asbestos cases are extremely well documented. In the lifetime of that litigation, over 60% of all money that has changed hands has gone to attorney’s fees and costs, with less than 30% going to compensate victims. See John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1388 n.173 (1995) (stating that there is no reason to believe the numbers for the tobacco, gun, and fast food litigation will be different).

²⁵² *Spain v. Brown & Williamson Tobacco Corp.*, 230 F.3d 1300, 1312 (11th Cir. 2000) (inviting the Alabama Supreme Court to comment on the Eleventh Circuit’s interpretation of merchantability and cigarettes); Proof Brief of Certain Defendants on Questions of Law Certified by the Hon. Mark W. Bennett of the U.S. Dist. Ct. for the Northern Dist. of Iowa at 48–50, *Wright v. Brooke Group, Ltd.*, (No. 01-712) (Iowa filed June 29, 2001); Reply Brief of Certain Defendants on Questions of Law Certified by the Hon. Mark W. Bennett of the U.S. Dist. Ct. for the Northern Dist. of Iowa at 24–25 (No. 01-712) (Iowa filed Aug. 20, 2001) (requesting the Iowa Supreme Court to answer certified questions by declaring cigarettes merchantable as a matter of law). *Wright* is currently awaiting oral argument.

merchantability and result in an overall weakening of the Code by analogizing its provisions to other laws. Therefore, courts should interpret section 2-314 of the U.C.C. as a warranty that merely requires goods to fulfill the basic functional purpose for which such goods are used. This approach ultimately provides the best interpretation of the implied warranty of merchantability and ensures the preservation of U.C.C. section 2-314 as a viable warranty in the sale of goods.